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ABSTRACT

The chapters in this book contain a comprehensive reference to recent state appellate and federal court decisions affecting the operation and governance of public elementary and secondary schools. The chapters are: (1) "The Use of School Facilities by Student Groups for Religious Activities," (2) "Denial of Standard Diploma to Handicapped Students," (3) "Creation Science in the Public Schools," (4) "Determining Causality by Inference: Use of Statistics in the Courtroom," (5) The Right of the State to Control Church-Related Schools," (6) "Reduction in Force: A Legal Update," (7) "An Overview of the Law Regarding Search and Seizure in Public Schools," (8) "Legal Aspects of Pupil Evaluation," (9) "School Crime Prevention: NOLPE's Role," (10) "Extracurricular Activities: Legal Developments," (11) "Conservative Pressures on Curriculum," (12) "Parental Liability for Student Vandalism," (13) "Teacher Dismissal for Immoral and Illegal Conduct," (14) "The Federal Regulatory Process: An Overview and Prognosis," (15) "The Testing of Teachers: Legal Parameters and Procedures," (16) "The New Member on the Court: Potential Effect on School Law Decisions," (17) "Recent Decisions on Rights of the Handicapped," (18) "Termination of Teacher Contracts in Canada," (19) "Home Instruction in Lieu of Compulsory Attendance: Statutory and Constitutional Issues," and (20) "Financing Educational Facility Construction: Prevailing Wage Litigation." (MLF)

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School Law Update—1982

Edited by
Thomas N. Jones
and
Darel P. Semler

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A TRIBUTE TO
Dr. M. A. McGhehey

by E. Edmund Reutter, Jr.

Delivered at NOLPE Banquet, San Francisco, November 20, 1982

My responsibility tonight is a "sad honor." Neither word warrants amplification for this audience. However, the officers, directors, and staff of NOLPE join me in wishing to make the occasion not one of mourning, but rather a celebration of Marion McGhehey's life. For his was a life of profound significance on many fronts. Mac (as he was affectionately known to NOLPEans) was a big man—in physical figure, but even more, figuratively. I shall endeavor to capture a few of his many dimensions and some of his prodigious accomplishments connected to the symbiotic relationship between him and NOLPE over the span of much of his professional career and all of NOLPE's existence. Each of you will be able to fill in personalized vignettes.

Mac was born and educated in Indiana. He utilized three of that state's institutions for his formal education: Central Normal College for his B.S. degree in 1945, Butler University for his M.S. in 1947, and Indiana University for his Ed.D in 1953. Even in his youth his interests were broad and varied, undergraduate majors being business education and social studies, and a minor being music theory. These can partially account for some "McGhehey-abilia" I have picked up during my many associations with him over the 27 years since we met at NOLPE's first conference. For examples, he once won a statewide typing contest, he knew many obscure details about the French revolution, he was an avid pursuer of the genealogy of McGheheys, he played the piano with great skill, and his knowledge (and collection) of antique phonograph records and equipment was awesome.

Mac also took selected courses in law schools to help him develop further his passionate interest in the interrelationships of law and his primary profession of education, particularly education policy, organization, and administration. From 1954 onward, except for one year in the United States Office of Education as Specialist in School Law, Mac directed associations of state school boards, first in Indiana and since 1961 in Kansas.

In that year of 1961 Mac finished his year as NOLPE's President and became the Secretary-Treasurer of NOLPE, the position that evolved into that of Executive Secretary through the constitutional changes affected in 1967 (the year, I am pleased to say, of my presidency). NOLPE was by then in need of more powerful executive leadership, and Mac more than filled the position description. With the extended continuity of policy embraced in other constitutional changes regarding the governing board and the presidency (particularly the executive committee concept) Mac was able to lead us to the prominant position NOLPE occupies today. Although by nature a strong executive, Mac always was appreciative of his role vis-a-vis the policy formulation process of the organization. His ability and his experience in connection with professional associations were effectively applied to develop the many and varied services today supplied uniquely by NOLPE.

To this end Mac utilized his gift for selecting personnel, and brought onto the central staff people who could and did function exceptionally well (to which all in the audience can attest). He was able to muster substantial talent from within the membership, much here tonight, and to encourage members to undertake various responsibilities in the production and dissemination of NOLPE materials. As Mac himself received financial compensation of only token nature in comparison to his time, effort, and results for NOLPE, he was able to get others to make professional contributions to the organization for little or no financial payment. He believed in service—at minimal cost, but at maximal quality. To maintain the latter he dedicated untold hours to substantive editing in an effort to assure that, in a field increasingly invaded by dilettantes, NOLPE education law items were reliable. His keen mind and his remarkable memory for detail complemented his tireless energy to this end.

His extensive contacts, enriched as he roved the country under assorted auspices, helped him to anticipate needs and to pick NOLPEans to fill them. Mac separated friendship and expediency from professional evaluation when he approached individuals, or when they approached him, for NOLPE writing or speaking projects. He was a remarkably objective person—analytical as to facts and always evaluating ideas on their merits, not their sources. This characteristic was also revealed in his writings and in the programs he structured. Although he was decisive in his acts and conclusions, he always sought a full airing of pros and cons, both as a basis for *his* conclusions and as a resource so that others could balance competing considerations in reaching *their* conclusions.

Although he definitely was not a propagandist of selected views, he had zest and zeal for disseminating education law information. Were he not such a separationist in the church-state area, I would have said he had the "missionary" spirit. But the "message" of McGhehey was that one should know the facts and ponder their impact, not passively accept any fixed solution or formulation.

Where Mac went, NOLPE went. He never failed to mention the organization and its services. As Mac was a sought-after speaker and panelist, it is impossible to measure the publicity that NOLPE thus received. Mac in his school law work did not separate "McGhehey" from "NOLPE." By personal knowledge I can testify that NOLPE (with its jaw-breaker full name and its five-letter two-syllable acronym) is now known throughout the country in a way that should be most satisfying to its members. This situation is due in substantial extent to Mac's executive efforts on our collective behalf.

Mac worked a seven-day week with long hours. His NOLPE work was in addition to a demanding full-time position as Executive Director of the Kansas Association of School Boards. Thus late evening and weekend calls from Topeka to me, and vice versa, were common. They were relatively economical, and they permitted explorations of ideas and problems. For Mac was not an impulsive person, and he liked to explore all angles of both academic and operational issues. He sought advice from different people on different subjects, but then *he* made the decisions in NOLPE's best interests as he saw them.

And how clearly, in general, he did see them! He was a man of vision. He anticipated well, and effectively steered NOLPE's course for over two decades. This period saw the field of education law change from a "What's that?" to a specialty recognized both in education and in law, and from one where materials were scant to one beset with an oversupply of materials. NOLPE evolved from a somewhat esoteric association to a well known organization whose imprimatur is sought by professors of law and of education, by practicing attorneys, and by commercial interests. Through it all, however, Mac was a deliberate leader of our organization. He personally refrained from, and cautioned our policy-makers against, being lured out of our unique status. He has left us situated as a very desirable entity, courted by varied interests—individual, professional, and commercial—seeking entry, or a boost upward, in this burgeoning area of school law. He has left us with a very viable organization. Let us hope we can capitalize on the opportunity further to advance and to adapt.

His ability to integrate and project from experiences made him an unusual combination of "idea man" and of realist. He leavened life with a keen sense of humor. He had limericks for most occasions. He loved legal-oriented humor, as exemplified in his frequent pieces entitled "Judicial Humor" in the *NOLPE School Law Journal*, which he established and edited. Similarly he established the NOLPE School Law Seminar venture in 1975 with the "New Orleans School Law Seminar," which has enjoyed eight annual meetings, apparently professionally successful and objectively successful financially despite a low fee for attendance and increasing competition from other sponsors as well as from other NOLPE seminars that followed. Mac's personal and professional participation in the New Orleans seminars and many other of NOLPE's seminars was instrumental in their success. His penchant for obtaining evaluations by participants guided him in his subsequent recommendations regarding frequency, content, staff, and place for seminars. The McGhehey emphasis on low-priced quality service that the membership desired made the seminar thrust highly successful. That the form was much copied by other sponsors was an accolade for Mac, but one which caused him, with characteristic realism, to recommend recently a reduction of, and more selectivity in, our seminars so that losses in some did not wipe out the financial viability of others that were well subscribed.

Mac did not like long-winded speeches. Further, although he possessed much self-confidence, he was not a seeker of the limelight and got fidgety when speakers praised him. So, surely I must not risk offense by unduly prolonging these remarks, though prolonged they could be. I could chronicle other significant events in NOLPE's history, and Mac would somehow or other be involved—over a period of 21 years as executive of NOLPE plus one as president, in an organization whose first meeting was just 27 years ago. His original ideas were numerous. These, augmented by the ideas of others (ideas always welcomed and often sought), he was able to translate into action, then evaluate, and then adjust where needed.

Mac always insisted that all the facts on a subject he produced; so I must here note for the record that Mac was a human being and subject, therefore, to some imperfections. Also, it would not be correct to assume that he and I always agreed on strategies or on minor goals. But as far as NOLPE was concerned, the fit of Mac to the ideal conception of the position he held was a remarkably tight one.

Some here tonight might view my remarks as exaggerated. They would not be truly familiar with Mac and his work (nor would they be familiar with me and my approach).

What, then, is a proper "tribute" to Mac? I submit that it is for each of us to contribute to the continuing development and flourishing of the organization that he personified--an organization uniquely in a position to improve society by improving the effectiveness with which the legal element is inserted into the education decision-making process at all levels.

Let us figuratively rise to this challenge as our tribute. And let us literally rise for a minute of silence in memory of, and in gratitude to, Mac McGhehey, our respected, revered, and yes, beloved, recently-departed-from-us executive secretary.

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The Use of School Facilities by Student Groups for Religious Activities

PHILIP K. PIELE AND STEPHEN M. PITT

Philip K. Piele received his Ph.D. from the University of Oregon, where he is now professor of educational policy and management, director of the ERIC Clearinghouse on Educational Management, and executive secretary of the Oregon School Study Council. He has served as editor of the *Yearbook of School Law* since 1975. He has contributed chapters on property for the *Yearbook* since 1972 and has written numerous monographs, papers, and journal articles on a variety of school law topics. Dr. Piele serves on the editorial boards of several professional journals and is book review editor of the *Journal of Law and Education*. He is past-president of NOLPE.

Stephen M. Pitt is a Ph.D. candidate with a law and education concentration in the Division of Educational Policy and Management, College of Education, University of Oregon, and a graduate of the University of Denver College of Law.

A trio of recent federal court decisions have dealt with the use of public university and public school facilities by student groups for religious activities. The first case is *Widmar v. Vincent*,[1] decided by the United States Supreme Court in 1981. The second is *Brandon v. Board of Education of Guilderland*,[2] decided by the Second Circuit Court of Appeals and denied *certioriari* by the Supreme Court seven days after the *Widmar* decision. And the third case is *Lubbock Civil Liberties Union v. Lubbock Independent School District*[3] decided by the Fifth Circuit Court of Appeals in March of 1982 and denied *certioriari* by the Supreme Court in January 1983.

Following a discussion of these cases, we will examine the courts' use of the concept of "impressionable youth" to distinguish a "public forum" in a university from an activity meeting in a public school. This distinction appears to have formed the basis for the courts' rulings that regulations preventing student religious groups from using public university facilities violate the first amendment whereas regulations preventing similar groups from using public high school facilities do not violate first amendment rights.

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[1] ___ U.S. ___, 102 S. Ct. 269 (1981).

[2] 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1981).

[3] 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3528 (Jan. 18, 1983).

WIDMAR V. VINCENT

The University of Missouri at Kansas City had a long-standing policy of encouraging the oncampus activities of student groups, which resulted in the routine use of facilities by over 90 registered student groups. Nevertheless, in 1977 the university denied a registered student religious group named Cornerstone permission to use its facilities for meetings. The university based its decision on a regulation adopted in 1972 prohibiting the use of university buildings and grounds "for purposes of religious worship or religious teaching." This action was taken despite the fact that from 1973 to 1977 Cornerstone had, with the permission of the university, used campus facilities for meetings.

Cornerstone had stated on its request form that its purpose was to "promote a knowledge of Jesus Christ among students." The group's oncampus meetings—held in classrooms and the student center—"were open to the public and attracted up to 125 students." A typical Cornerstone meeting included "prayer, hymns, Bible commentary, and discussion of religious views and experiences."[4]

Eleven members of the group, all university students, brought suit in federal district court challenging the university regulation and alleging that it violated their first amendment rights of free exercise of religion and free speech and their fourteenth amendment rights of equal protection. When the federal district court upheld the regulation, which it reasoned was required by the establishment clause, the students appealed to the Eighth Circuit Court of Appeals. This court reversed the district court, holding among other things that the university regulation constituted content-based discrimination against religious speech without a showing by the university that it had a "compelling state interest" to do so, and that the establishment clause does not bar a policy of equal access where the "primary effect" of such a policy is not to advance religion but to further the central purpose of developing students' "social and cultural awareness as well as intellectual curiosity."[5]

In affirming the Eighth Circuit's decision, the United States Supreme Court, in an 8-1 decision, identified and disposed of three major issues.

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[4] Widmar, 102 S. Ct. at 272 n.2

[5] *Id.* at 273.

The first issue was whether a discriminatory exclusion from an open public forum may be justified by the religious content of the speech?

By opening its facilities to student groups in general, the Court said the university created a "public forum" at least for its students and must therefore meet the constitutional standard for any discrimination or exclusion based upon the content of their speech, whether religious or secular in nature. In a lengthy footnote the Court attempts to define a public forum in the context of a university.

> The Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. See generally, *Police Dept. v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286, 33 L.Ed.2d 212 (1972); *Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453, 13 L.Ed.2d 471 (1965). "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas'." *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 2345, 33 L.Ed.2d 266 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . (would be) limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182, 92 S. Ct., at 2346. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial (to particular groups) of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184, 92 S. Ct. at 2345, 2347.
>
> At the same time, however, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L.Ed.2d 731 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.[6]

The standard is the following two-part "test": (1) Is the regulation or policy upon which the exclusion is based necessary to serve a compelling state interest? and (2) Is it narrowly drawn to achieve that end? The test is to be applied strictly because of the fundamental principal that state regulation of speech should be content-neutral.

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[6] *Id.* at 273 n.5

As to the first part of the test, the university argued, and the Court agreed, that there is a compelling state interest in maintaining a separation of church and state in proscribing actions that would violate the establishment clause of the first amendment. The question now is whether the university regulation is necessary to achieve this interest.

The second issue is whether an "equal access" policy for all student groups would violate the establishment clause? Such a policy would not violate the establishment clause if it can pass the three-part test formulated by the Court in *Lemon v. Kurtzman:*[7]

1. The government policy must have a secular legislative purpose.
2. Its principal or primary effect must be one that neither advances nor inhibits religion.
3. The policy must not foster "an excessive entanglement with religion."

Part 1 of the test is met, said the Court, because the university's stated purpose was to create a forum in which students could exchange ideas. "By creating a forum the University does not thereby endorse or promote any of the particular ideas aired there."[8]

Part 3 is met because the potential for entanglement would increase if the university attempted to enforce its exclusion of religious worship and religious speech.

> We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar, supra,* at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus,* 613 F.2d 931, 936 (CADC 1979) (footnote omitted); see L. Tribe, American Constitutional Law Section 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.[9]

As to part 2 of the *Lemon* test, the Court concluded that the fact that a religious organization enjoys "incidental" benefits due to equal access to a public forum does not in itself violate the primary effect test, in the absence of evidence that religious groups would dominate the university's public forum. The Court enumerated two "factors" that lend weight to the finding of incidental benefit rather than primary benefit to religion:

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[7] 403 U.S. 602, 91 S. Ct. 2105 (1971).

[8] *Id.* at 275 n.10.

[9] *Id.* at 275 n.11.

a) The open forum in a public university does not create a stamp of state approval on religious sects or practices.
b) The forum is open to a broad range of nonreligious speakers and groups.

The final issue to be addressed by the Court was whether a state interest in achieving greater separation of church and state than is already ensured under the establishment clause of the United States Constitution is sufficiently compelling to justify content-based discrimination in an open public forum?

It appears that the Court used a balancing test, weighing the first amendment rights of students against the university's interest in achieving greater separation of church and state than that assured by the establishment clause. The Court reasoned that the state's rights in this area are limited by both the free exercise clause and the free speech clause, and that the state's interest in this constitutional context is not sufficiently compelling to allow content-based discrimination against the student's religious speech.

The Court concluded by explicitly limiting the scope of its decision. The relatively narrow holding is that, where the university has created a forum generally open to student groups, it may not enforce a policy that discriminates on the basis of the religious content of student speech. The Court, however, upheld the university's right to establish reasonable time, place, and manner regulations, to allocate resources, and to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[10] In addition, the Court reaffirmed the line of cases that allow universities to exclude even first amendment activities that "violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."[11]

It is clear from this and other dicta in the decision that *Widmar's* scope cannot be extended beyond the facts of the case. In a case where a university has not provided general access to student groups, *Widmar* would not control.[12] *Widmar* also differs from cases where public school facilities are open to use by religious groups, but not to others.[13]

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[10] *Id.* at 278.
[11] *Id.*
[12] *Id.* at 276 n.13.
[13] *Id.* at 275 n.10.

In a concurring opinion, Justice Stevens found the "compelling state interest" test used by the Court to infringe on the academic freedom of public universities. The test he proposed was originally fashioned in *Healy v. James*[14]—that in discriminating against one group of students in the use of campus facilities, the university must have a "valid reason." Does the university have a valid reason for such discrimination in this case? No, says Stevens,

> In this case I agree with the Court that the University has not established a sufficient jusification for its refusal to allow the Cornerstone group to engage in religious worship on the campus. The primary reason advanced for the discriminatory treatment is the University's fear of violating the Establishment Clause. But since the record discloses no danger that the University will appear to sponsor any particular religion, and since student participation in the Cornerstone meetings is entirely voluntary, the Court properly concludes that the University's fear if groundless. With that justification put to one side, the University has not met the burden that is imposed on it by *Healy*.[15]

Stevens also specifically repudiated the Court's equating the university's encouragement of student organization activities with a public forum. "Today most major colleges and universities are operated by public authority. Nevertheless, their facilities are not open to the public in the same way the streets and parks are. University facilities—private or public—are maintained primarily for the benefit of the student body and the faculty."[16]

However, in a footnote the majority said that Stevens' concern over extending the public forum protection to the university is unjustified because the decision is limited to the context of a public forum created by the university itself.

Dissenting Justice White disposed of the majority argument by finding that speech with a religious content stands on a different footing than secular speech with regard to first amendment protections. He concluded that religious worship is not speech at all for first amendment purposes. Balancing the burden of the student group's ability to exercise their religious beliefs against the state's interest in enforcing its regulation, Justice White found that the burden on religious exercise is minimal in this case and that the state has shown their regulation serves a "permissible end"—the separation of church and state.

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[14] 408 U.S. 169, 92 S. Ct. 2338 (1972).

[15] Widmar, 102 S. Ct. at 280.

[16] *Id.* at 278.

BRANDON V. BOARD OF EDUCATION OF GUILDERLAND

Seven days after deciding *Widmar*, the Supreme Court denied *certiorari* in a New York case involving a group of high school students calling themselves "Students for Voluntary Prayer." The students were denied permission by the Guilderland School District "to conduct communal prayer meetings in a classroom immediately before the school day commenced."[17] In seeking permission to use the school facilities, the group asserted that it would not require teacher supervision or involvement, and furthermore, that "its activities were voluntary and would not conflict with other functions." The students brought action in federal district court alleging that the district's denial of permission violated their first and fourteenth amendment rights to free speech, the free exercise of religion, association, and equal protection.

Granting summary judgments to the school district, the district court found that "the Establishment Clause of the First Amendment barred the school from permitting the students to conduct prayer meetings in a classroom."[18] Applying the tripartite test for establishment clause analysis formulated in *Lemon*, the court found that, although the use of school property may have a secular purpose, the granting of the group's request would advance religion (thus failing part two of the *Lemon* test). The students' use would also result in excessive entanglement because teacher supervision would be required to assure that the meetings were voluntary, thus failing part three of the test. The court also rejected the free exercise of religion, freedom of speech and association, and equal protection arguments by the students.

The Second Circuit Court of Appeals affirmed the district court's decision. In discussing the district court's opinion that the granting of the student's request would advance religion, thus failing the "effects test" in *Lemon*, the circuit court first posed the following question: "Does a particular policy neutrally applied to religious organizations merely accommodate religious interests, or does it advance those nonsecular interests impermissibly?"[19]

The circuit court used what we shall call the "impressionable youth theory" to say, "yes," allowing "Students of Voluntary Prayer" use of the school facilities would advance nonsecular interests impermissibly.

In disposing of the student's argument 'that they merely seek to exercise their rights of free speech in a public forum," the appellate court said that

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[17] Brandon, 635 F.2d at 973.

[18] *Id.* at 973-74.

[19] *Id.* at 978.

> a high school is not a "public forum" where religious views can be freely aired. While students have First Amendment rights to political speech in public schools, . . . sensitive Establishment Clause considerations limit the right to air religious doctrines. Equally compelling, the students in this case propose to conduct *prayer* meetings in the high school, not merely discussions about religious matters.
>
> . . . .
>
> . . . The students' free speech and associational rights, cognizable in a "public forum" are severely circumscribed by the Establishment Clause in the public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context.[20]

LUBBOCK CIVIL LIBERTIES UNION V. LUBBOCK INDEPENDENT SCHOOL DISTRICT

In 1979, the Lubbock School District modified a long-standing policy that had allowed various religious practices in the district, including such things as "morning Bible reading over school P.A. systems, classroom prayers led by teachers, and distribution of the Gideon Bible to fifth and sixth graders."[21] In its place, the district adopted a new policy allowing student-initiated religious activities. Radically altered in 1980 after the Lubbock Civil Liberties Union (LCLU) filed suit against the district, the policy stated in paragraph 4 that students were permitted "to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary."[22]

The LCLU challenged paragraph 4 of the new policy in federal district court claiming that it violated the establishment clause. The court determined that the newly adopted policy was not "facially unconstitutional." The LCLU appealed. The central issue addressed by the Fifth Circuit Court of Appeals was whether the school district policy violated the establishment clause of the first amendment. As did the courts in the two previous cases, the appellate court turned to the three-part *Lemon* test.

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[20] *Id.* at 980.
[21] Lubbock, 669 F.2d at 1039.
[22] *Id.* at 1041.

In reversing the district court's decision, the appellate court found that, although a neutral policy granting all student groups access to school facilities (including religious groups) generally reflects a secular purpose, the focus of this policy is on religion. It is "clearly designed" to allow meetings of religious groups. The district's justification for the religious meetings, which was the development of leadership and communication skills, were found to be goals that can be attained through nonreligious associations. Thus the policy fails part 1 of the test.

Question 2 of the *Lemon* test, restated by the appellate court is, "Whether the consequence of the policy is to place the district's "imprimatur" upon religious activity?" Three factors combine to answer this question affirmatively. First, because of the timing of the meetings (at the beginning and the end of the school day) there is an implicit approval by school officials and implied recognition of the programs as part of the school's extracurricular activities. The second factor considered by the court is the impressionability of school-age children. A third factor is the district's use of its compulsory education machinery to provide students for program attendance. The district's contention that a lack of coercion is a critical fact in determining primary effect was specifically rejected. The court concluded that there is a primary effect of advancement of religion and not merely an incidental benefit.

The entanglement question is to be determined by whether the state must engage in continuing administrative supervision of the nonsecular activity. The district admitted that it would continue to furnish school personnel to supervise the students. The fact that no district funds are required does not relieve it from entanglement.

As to the district's argument that the school is a public forum, "maintaining that it created same when it allowed many student groups to meet before or after school,"[23] the court replied that the district's argument misapprehends the definition of a public forum. "The holding of student meetings at a public school does not turn that school into a public forum."[24] Citing both *Brandon* and *Widmar*, the appellate court quoted the passage from *Brandon* that explicitly rejected the public forum argument.

ANALYSIS OF THE "PUBLIC FORUM" ISSUE

To determine the Supreme Court's position on the use of public school facilities by nonsecular student groups, we must attempt to tie *Widmar*, *Brandon*, and *Lubbock* together, look at the definition of a "public forum," and consider the concept of "impressionable youth."

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[23] *Id.* at 1048.

[24] *Id.*

In *Widmar*, the Court said that the campus of a public university, at least for its students, possesses many characteristics of a public forum.

The Court further stated that a public forum in a state university does not confer the imprimatur of state approval on religious sects or practices because university students are young adults and are therefore less impressionable than younger students and "should be able to appreciate that the University's policy is one of neutrality toward religion."[25] This dicta, set out in a majority opinion footnote, is picked up by the circuit courts in *Brandon* and *Lubbock* and becomes a critical distinction between their decisions and *Widmar*.

In *Brandon*, the appellate court stated that a high school is a public forum for political views but not religious views because high school students are "impressionable youth," presumably unable to determine the state's neutral position regarding religion. "To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state had placed its imprimatur on a particular religious creed."[26] Here the circuit court combined the presumed impressionability of the high school students with the potential appearances of state approval to reach a decision opposite to that in *Widmar*.

Finally, in *Lubbock*, the court never really tried to define a public forum in the context of this particular case other than to say that a policy encouraging voluntary student groups to hold meetings in school for educational, moral, or religious purposes does not create a public forum. The court does not pursue this distinction in depth and probably with good reason.

What is it that distinguishes a "public forum" in a university from an activity meeting at a public school? Is it the age of the students? If so, at what age does an exchange of ideas become mature enough to acquire protected "public forum" status? If secondary students have first amendment rights as to the political content of their speech, is there to be less protection or no protection for religious content? Are high school seniors really more likely to misinterpret the imprimatur of state approval than college freshmen? Are we to suppose that the young adults in high school are so impressionable that they cannot make the distinction between an open exchange of ideas permitted by the state and a particular credo advanced by it? Why do we assume political maturity for these students, yet religious naivete? These are some of the questions left unanswered by these cases.

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[25] Widmar, 102 S. Ct. at 276 n.13.

[26] Brandon, 635 F.2d at 978.

Where does this leave public school administrators? At the college level, *Widmar* will control only if the school has already opened its facilities generally to student groups. If the school has not been opened to use by other groups, the administration may deny use to the religious group, and in fact, would risk the appearance of sponsorship of religious views by opening the facilities only to religious groups. *Brandon* and *Lubbock* are binding precedent only in their own jurisdictions, but the fact that they are consistent and that both were recently denied review by the Supreme Court may make them very persuasive in other jurisdictions. Secondary school policy allowing student religious groups to use their facilities will have a major obstacle to overcome in the precedent of *Brandon* and *Lubbock*. Although the Supreme Court itself did not specifically distinguish between university and secondary level schools and students regarding "impressionability" and "public forum" concepts, it seems willing to adopt the convenient line drawn by the two appellate courts.

Perhaps the best illustration of the capricious nature of the public forum concept is a situation in which an adult religious group requests the after-hours use of a public secondary school's facilities. If the facilities have been opened to other adult groups, the administration finds itself in the twilight zone between *Widmar* on the one hand and *Brandon* and *Lubbock* on the other with no clear constitutional guidelines. Analogizing from *Widmar* to allow all adult groups "equal access" to the facilities risks a finding that a public secondary school does not have the peculiar characteristics of a "public forum" and thus that the establishment clause is violated. The Court at least hints at this possibility in a footnote to *Widmar* alluding to the unique history of universities as a "marketplace of ideas."

Yet following the *Brandon* and *Lubbock* reasoning and denying access to the adult religious group risks an opposite conclusion—that once the problem of "impressionable youth" is eliminated (since we are dealing with adult groups) the secondary school may be a public forum after all, in which case the group's first amendment rights of speech and association are violated by exclusion based upon the religious content of their speech.

A fitting conclusion is the following passage from the play "*It Is So (If You Think So)*" by the great Italian dramatist Luigi Pirandello. In this passage, Laudisi, the main character in the play, states Pirandello's belief that all truth is subjective.

> *Laudisi*. So you see me! But that's not enough. Come here!
>
> *Sirelli*. [Smiling, he obeys, but with a puzzled expression on his face as though he fails to understand what Laudisi is driving at.] Well, here I am!

> *Laudisi.* Yes! Now take a better look at me . . . touch me! That's it—that's it! Now you are touching me, are you not? And you see me! You're sure you see me?
>
> *Sirelli.* Why, I should say . . .
>
> *Laudisi.* Yes, but the point is, you're sure! Of course you're sure! Now if you please, Signora Sirelli, you come here. . . . You see me, do you not . . . ?
>
> . . . .
>
> . . . Now you have touched me, have you not? And you see me? And you are absolutely sure about me, are you not? Well now, madam, I beg of you; do not tell your husband, nor my sister, nor my niece, . . . what you think of me; because, if you were to do that, they would all tell you that you are completely wrong. But, you see, you are really right; because I am really what you take me to be though my dear madam, that does not prevent me from also being really what your husband, my sister, my niece . . . take me to be—because they also are absolutely right![27]

What one thinks is true, says Pirandello, is, in fact, true. This relativist philosophy appears to be at work in the differential definition of a public forum in an educational institution. What the court thinks (and therefore says) is a public forum *is* a public forum.

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[27] L. Pirandello, *It Is So (If You Think So)* in E. Bently (ed.) Naked Masks: Five Plays by Luigi Pirandello (1952) at 70.

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Denial of Standard Diploma to Handicapped Students

JULIAN E. CANNELL

Julian E. Cannell is an attorney actively practicing school law with the firm of Kavanagh, Scully, Sudow, White & Frederick in Peoria, Illinois. His firm represents several school districts, including the Tazewell-Mason Counties Special Education Association. He received his J.D. from Northwestern University. He is an Arbitrator for American Arbitration Association and has been a speaker for Illinois Institute for Continuing Legal Education and educational seminars sponsored by Bradley University.

INTRODUCTION

At commencement ceremonies this year, thousands of high school graduates will receive diplomas that are virtually counterfeit. After 12 years of schooling, they have not learned minimum skills in reading, writing and mathematics.[1] The overwhelming majority of states have responded with legislation or state board regulations to the widespread perception that unacceptably large numbers of students graduate without mastering the basic skills necessary to function productively in the adult world. These responses have resulted in the creation of minimal competency programs for students and educators.

Federal laws have been enacted which compel all states to provide access to public education to handicapped students. The Education for All Handicapped Children Act (EAHCA)[2] requires all states that accept federal funds under the Act's provisions to provide handicapped students a free appropriate education in the least restrictive environment, and section 504 of the Rehabilitation Act[3] prohibits discrimination on the basis of disability.

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[1] U.S. News and World Report, June 21, 1976.

> Many are the victims of "social promotions" that advance them grade by grade regardless of what they have actually learned.
>
> Now, in States and School districts in every part of the country, the notion of setting up minimum competency requirements for a high school diploma is rapidly taking hold.
>
> Proponents contend that the growing number of students who leave high school as "functional illiterates" is destroying the credibility of the diploma. Requiring minimum education levels, they say, would force a measure of accountability on public school systems and teachers.

[2] 20 U.S.C. § 1401 (referred to as "EAHCA").

As a consequence of the parallel development of minimal competency programs and federally imposed protection of the handicapped, state and local school boards are putting into effect new policies to protect handicapped students and, at the same time establishing minimal competency programs which deny some handicapped students a standard diploma. Handicapped students have refused to accept graduation status other than a standard diploma. Public schools have refused to award a standard diploma that handicapped or non-handicapped students cannot or have not earned. Suits have been filed, and our judiciary has given us inconsistent answers.

THE ISSUES

Generally, a standard diploma is granted in recognition of a status that is earned by the recipient. There is no absolute right to it. The ultimate issue is then whether handicapped students who fail to meet graduation standards can be denied a diploma. The answer depends upon the "fairness" of the diploma standards or the procedures to implement such standards. Accordingly, the material that follows will address first the question of fair standards, and secondly, the fairness of the procedures for administering new graduation standards. For example, using an "unfair" test to determine who graduates is a violation of the equal protection clause. A "fair" test administered in a discriminatory manner violates due process.

Substantially all of the litigation on diploma standards have questioned state or local policy linking graduation to passing tests of basic skills. Other diploma standards or requirements are being or will be challenged by handicapped students who cannot meet them. The discussion of the issues will be limited to minimal competency testing programs (M.C.T.) that deny standard diplomas to handicapped students because this specific problem has been litigated and we have the benefit of published decisions. Both the logic and precedent of such decisions would be applicable to diploma requirements other than M.C.T. programs.

The success or failure of litigation challenging diploma standards may depend upon who has the burden of proof. If it can be shown that a diploma program discriminates on the basis of race, then the courts apply a "strict judicial scrutiny" standard which requires defendant educational institutions to prove the fairness of that program. Generally, handicapped students have not been considered a "suspect class" and the courts have applied the "rational basis" standard which requires handicapped plaintiffs to prove that the diploma program is unfair.[4]

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[3] 29 U.S.C. § 794.

DIPLOMA STANDARDS—ARE THEY FAIR?

The establishment of graduation requirements or any other education goal is committed generally to the discretion of school authorities.[5] Courts should not override the decision of state agencies on questions of educational goals, programs or the appropriate federal roles in competency testing, former Health, Education and Welfare Secretary Califano stated:

> It is one of the chief virtues of our Federal system that we have fifty potential laboratories for innovation in education; fifty different centers for developing ideas and programs. I believe that every state should have a program for developing and measuring basic skills that include competency testing; but I think each of the fifty states—and each of the school districts within those states—should decide how it can make most effective use of competency testing in its program. The Federal government should support but not direct, their efforts.[6]

The technical validity of the Peoria School District diploma test was upheld by a Federal District Court in the recent decision of *Brookhart v. Illinois Board of Education.*[7] A proceeding for judicial review was brought pursuant to § 1415(e)(2) of EACHA[8] by 15 handicapped students, 11 of whom had met all graduation requirements except for passing an M.C.T. The Peoria School District began the development of a local M.C.T. program in 1974. The program was formally approved by the school board in 1978 and implemented with the 1980 graduates. Under the program, high school students have five opportunities for passing a three-part test prior to scheduled graduation.

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[4] *See* 20 U.S.C. § 1400(b)(1), "Handicapped students are a large, diverse and amorphous class representing a substantial part of the student population. Accordingly, educational programs that may deny handicapped students diplomas would be properly considered and resolved by applying the "rational basis test" rather than the standard of "strict judicial scrutiny." *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278 (1973); Sherer v. Waier, 457 F. Supp. 1039, 1047 (W.D. Mo. 1978). Turillo v. Tyson, 535 F. Supp. 577 (R.I. 1982), *dicta* at 582.

[5] Ingraham v. Wright, 430 U.S. 651, 682 (1977).

[6] R. Jaeger & C. Tittle, Minimum Competency Achievement Testing (1980).

[7] 534 F. Supp. 725 (C.D. Ill. 1982), *reversed on other grounds*, ____ F.2d ____ (7th Cir. 1983).

[8] 20 U.S.C. § 1415(e)(2) (Education for All Handicapped Children Act).

The test is given each semester. Any student who does not achieve a score of 70 percent on any of the three parts is eligibile to retake the part failed each time the test is given. Refresher materials and course work are made available to all students who need them. Students who do not pass all three parts of the test, but who otherwise meet all graduation requirements, may elect to receive a "Certificate of Program Completion" at graduation time, but may also continue taking the M.C.T. until age 21. If such student passes all parts of the test after graduation, he or she would then receive a standard diploma. Severely handicapped students may be exempted from the test program upon parental request, but they do not receive a diploma. On the issue of test validity, Judge Morgan states:

> The court is satisfied that local boards of education and their staffs have the right, if not a positive duty, to develop reasonable means to determine the effectiveness of their education programs with respect to all individual students to whom they issue diplomas, and that the M.C.T. program here is a reasonable means. Nothing in federal or state law stands in the way. . . . Plaintiff's arguments that statutes are violated here is not supported by the cases cited, and the argument that the Peoria M.C.T. is scientifically invalid is simply not persuasive. Perhaps no test of human beings by human beings can always be scientifically exact, but that is not the measure. It is a reasonable test of the accomplishment of the school system in imparting basic knowledge to all its students, and unless some such measure is permitted, no cerification of graduation from an educational program can have any meaning whatsoever, to the student or to others, as the notice of educational attainment it is meant to be.[9]

Generally the issue of technical validity of a test or other diploma requirements will be resolved by a battle of educational experts. Each side retains "champions" who state their professional opinions as to whether the standards or test instruments fairly measure what they are supposed to measure. If it can be shown that there is a rational basis for the standards or test program, they will be upheld.[10]

A scientifically valid diploma standard or test is not necessarily "fair." The standard or test must afford the student a reasonable opportunity for success. In *Debra P. v. Turlington*,[11] the Fifth Circuit Appellate Court remanded the case for a determination as to whether the students had been exposed to the material tested. The court held that the Florida program would violate the equal protection clause if the State could not demonstrate that its examination is a fair test of that which is taught in its classrooms.[12]

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[9] Brookhart v. Illinois Bd. of Educ., 534 F. Supp. 725, 728 (C.D. Ill. 1982).

[10] Washington v. Davis, 426 U.S. 229 (1976).

[11] 644 F.2d 397 (5th Cir. 1981).

Some handicapped students because of their diminished mental capacity cannot meet standard diploma requirements. The fact that a diploma standard or M.C.T. includes matters not studied by some handicapped students does not render it unfair and in violation of the equal protection clause. Many academic requirements may be beyond the abilities of mentally handicapped children. Yet, academic standards are obviously important to the legitimate interest of educating students. To applaud the efforts in recent years to develop the potential of these unfortunate students is not to require that a diploma be issued to cover all degrees of academic achievement no matter how meager.[13] The special education programs offered to the mentally retarded benefit them more than would the normal academic program available. Some students, because of the very nature of their handicap, cannot fully participate in normal academic programs. It is the definition of "diploma" that is challenged rather than any barrier to a program. Handicapped students argue that because the school authorities have chosen to define their diploma to reflect a certain level of accomplishment, unlawful discrimination exists against those who cannot meet that standard because of their handicaps. If capacity to achieve diploma standards does not exist, the law does not require pretense to the contrary.[14]

Debra P. v. Turlington, is not a precedent for granting handicapped students a standard diploma.[15] In *Debra P.* the minority students had equal capacity to master the basic skills but may have been denied equal opportunity to pass Florida's test because of a dual system of education that caused racial bias. Some handicapped students lack the necessary mental capacity to understand the objectives or skills that diploma standards measure.

If there is a "rational basis" for excluding handicapped students from exposure to material necessary to meet diploma standards, such exclusion should not invalidate the diploma standards. The concept of "equal protection" requires that handicapped students be given a reasonable opportunity to achieve the status represented by a standard diploma; it does not require that students be taught material necessary for diploma status when such material is totally beyond their comprehension, nor does it require that diploma standards be lowered on an individualized basis to measure all degrees of academic achievement.

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[12] *Id.* at 408.

[13] Anderson v. Banks, 520 F. Supp. 472, 512 (S.D. Ga. 1981), 540 F. Supp. (S.D. Ga. 1982).

[14] Brookhart v. Illinois Bd. of Educ., 534 F. Supp. 725, 731 (C.D. Ill. 1982).

[15] 644 F.2d 397 (5th Cir. 1981).

DIPLOMA PROCEDURES

Handicapped students have challenged the procedures for implementing new diploma standards under EAHCA,[16] section 504 of the Rehabilitation Act[17] and the due process clause.[18] Generally, the schools have prevailed on EAHCA and section 504 claims, but have lost on due process claims. The legal theories for invalidating graduation standards which deny diplomas to handicapped students will be considered separately.

The EAHCA

The Education for All Handicapped Children Act (EAHCA) provides funding so that handicapped children are provided "access" to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. Plaintiffs in *Brookhart*[19] argued that the test procedures for a standard diploma constitute an educational placement within the purview of EAHCA because of the remedial courses that are included in a handicapped student's I.E.P.[20] when he or she fails to pass the Peoria M.C.T. Even if the denial of a diploma were to constitute a change in placement, the EAHCA provides only a hearing procedure to determine the appropriateness of the student's I.E.P. or placement; it does not grant to the federal government the right to participate in establishing state or local educational standards. The EAHCA does not guarantee that handicapped students will be able to attain the same level of achievement as other students, nor does it require that they be granted a status that they cannot or have not earned.[21] The Seventh Circuit in *Brookhart*, at page six of the slip opinion, states:

> Denial of diplomas to handicapped children who have been receiving the special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the M.C.T., is not a denial of a "free appropriate public education."[22]

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[16] 10 U.S.C. § 1401, *et seq.*; Board v. Ambach, 436 N.Y.S.2d 564 (N.Y. Supp. 1981).
[17] 29 U.S.C. § 794.
[18] U.S. CONST. amend XIV.
[19] 534 F. Supp. 725; ____ F.2d ____ (7th Cir. 1983).
[20] I.E.P. refers to "Individualized Education Program."
[21] Board of Education v. Ambach, 436 N.Y.S.2d 564 (N.Y. 1981).
[22] ____ F.2d ____ (7th Cir. 1983).

Congress did not intend to create enforceable substantive rights and obligations under the EAHCA. In *Board of Education of Hendrick Hudson Central School District v. Rowley*,[23] the Supreme Court defined what is meant by the EAHCA requirement of a "free appropriate public education" and the role of state or federal courts in reviewing education placements. At footnote 26, the Court states that Congress has not unambiguously imposed substantive conditions for educational programs under EAHCA. Thus, the hearing procedure provided at 20 U.S.C. § 1415 is the exclusive remedy available to handicapped students under EAHCA. This procedure is limited to complaints with respect to any matter relating to the identification, evaluation or educational placement of a child.[24]

In some states, a diploma is a "terminating" degree which cuts off any further tuition-free special education services.[25] Typically, handicapped students sue for the diploma and money—they do not request additional time to meet diploma standards. Even if the EAHCA permitted substantive claims, the position of handicapped students appears contradictory to the goals of the EAHCA. Specifically, instead of requesting access to free and appropriate education, they are demanding a social promotion out of the education program.

Section 504

Section 504 of the Rehabilitation Act[26] may be considered as the corollary to the EAHCA. The EAHCA requires the provision of educational services to the handicapped while section 504 prohibits exclusion from such services because of a handicap. The same set of facts may therefore support claims under either or both statutes. A valid diploma standard or test may violate the rights of a handicapped student under section 504 if the procedures for administering the program cause students to fail solely as a result of their handicapping condition. Modifications, under certain circumstances, are required. Braille or large print test booklets should be available to the visually impaired, and interpreters or special written instructions should be available to the hearing impaired. If a student has a physical impairment and cannot mark his exam, someone should be provided to mark it for him in response to his oral answers. The procedures for administering diploma tests or any other diploma standard must allow for such modifications as may be necessary to measure the students' knowledge and not his handicapping condition. While educational institutions that receive federal funds are required to build ramps to provide the handicapped access to the educational programs, there are no guarantees that once included in the program they will achieve the same results or status as non-handicapped students.

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[23] 102 S. Ct. 3034 (1982); *See also* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Colin K. v. Schmidt, 536 F. Supp. 1375 (R.I. 1982); *cf.*, William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982); Parks v. Pavkovic, 536 F. Supp. 296 (1982).

[24] 20 U.S.C. § 1415(b)(1)(e).

[25] Rule 3.03 of the Illinois State Rules Governing Administration of Special Education.

[26] 29 U.S.C. § 794, "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In *Southwestern Community College v. Davis*,[27] the United States Supreme Court ruled that section 504 does not compel educational institutions to disregard the disabilities of handicapped individuals, nor does it require educational institutions to make substantial modifications in their programs to allow disabled persons to participate.[28] Exclusion of handicapped children from a school activity is not improper if there is a substantial justification for the school policy.[29] Under this standard, failure to meet reasonable requirements for obtaining a diploma is sufficient justification for denying diplomas to handicapped students.[30]

Due Process

Under the fourteenth amendment, a state may not deprive a person of a federally-protected property or liberty interest without "due process."

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[27] 442 U.S. 397 (1979).

[28] *Id.* 99 S. Ct. at 2370-2371. Justice Powell states: "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."

[29] Kampmeier v. Nyquest, 553 F.2d 296 (2d Cir. 1977); New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982). The Tenth Circuit suggests a three-part test: "(1) the state's existing education programs preclude the handicapped from enjoying program benefits realized by the nonhandicapped; (2) program modifications would result in the handicapped obtaining those benefits; and (3) program modifications would not jeopardize the overall viability of the state's educational system." *Id.* at 855.

[30] Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725, at 728: "Plaintiffs also proceed upon a basic fallacy in arguing that such a test must be modified to take account of lack of mental ability or capacity. . . . To do so would simply be to pretend that the deficiency did not exist, and to fail completely to measure the learning. A diploma issued as a result of passing such a modified test would be a perversion of the program to lend meaning to the diploma as a record of educational achievement. The extent of the modification necessary to avoid the degree of learning deficiency would simply measure the pretense and the degree of the perversion of the program. This position does not involve any lack of compassion or feeling for people living with serious handicaps; it simply involved the avoidance of pretense, the integrity of a knowledge-testing program, and reserves some meaning for a high school diploma in relation to the attainable knowledge and skills for which the schools exist." *See also* Brookhart v. Board, ____ F.2d ____ (7th Cir. 1983).

Both handicapped and non-handicapped students have the expectancy of a diploma upon meeting the "fair" standard imposed for obtaining that status, and the arbitrary denial of a diploma by public school authorities is a violation of the federal constitutional right to due process of law.[31] Once it is determined that due process applies, the question remains what process is due.[32] Handicapped students argue that due process requires adequate notice of new diploma standards so that they have sufficient time to prepare. They claim that because of their handicapping condition they need more time to meet new diploma standards than other students, and that the refusal of the educational institution to delay the application of such standards violates due process.

In *Board of Education v. Ambach*,[33] the New York trial court ruled that the denial of diplomas to handicapped students who failed to pass a state imposed "basic competency test" did not violate section 504, the EHA or the equal protection clause, but that since the two named plaintiffs were given less than two years notice to prepare for the test, the implementation of the test program violated their due process rights. In *Wells v. Banks*,[34] the Georgia Court of Appeals affirmed a trial court decison refusing to exempt handicapped students from complying with a local school district diploma requirement that each student pass math and reading achievement tests. The *Wells* court decided the issue under the equal protection and due process clauses, the Rehabilitation Act was not in issue.

The issue of exit examination for handicapped students was also raised in *Anderson v. Banks*.[35] In this case there was a 24 month period between notice and implementation of the diploma test. The court upheld the legality of the diploma policy with respect to the educable mentally retarded children who would be foreclosed from receiving a high school diploma because of their failure to pass the "California Achievement Test."[36]

The Seventh Circuit in *Brookhart v. Illinois State Board of Education*,[37] reversed a district court decision approving the Peoria Public School's M.C.T. implementation procedures. Citing *Board of Education v. Ambach*, the Seventh Circuit held that a year to a year and a half, in view of the handicapped students' lack of exposure to the material tested, is constitutionally inadequate notice. Noting the inconsistent decisions in other jurisdictions on the issue of adequate notice, the court set out two alternative tests, either of which would satisfy due process requirements:

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[31] Debra P. v. Turlington, 644 F.2d 397, at 404.
[32] Morrissey v. Brewer, 408 U.S. 471 (1972).
[33] 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).
[34] 153 Ga. App. 581, 266 S.E.2d 270 (1980).
[35] 520 F. Supp. 472 (S.D. Ga. 1981); 540 F. Supp. 761 (S.D. Ga. 1982).
[36] 520 F. Supp. 472, at 506.
[37] 534 F. Supp. 725 (C.D. Ill. 1982); ____ F.2d ____ (7th Cir. 1983).

> Though we are unable on this record to define "adequate notice" in terms of a specific number of years, the School District can be assured that the requirement would be satisfied if one of the following two conditions for adequate notice is met. The School District can, first, ensure that handicapped students are sufficiently exposed to most of the material that appears on the M.C.T., or, second, they can produce evidence of a reasoned and well-informed decision by the parents and teachers involved that a particular high school student will be better off concentrating on educational objectives other than preparation for the M.C.T.

The school district in *Brookhart* argued that the due process issue should be determined on the basis of whether the handicapped plaintiffs had been given a reasonable period of time to try to meet newly imposed graduation requirements. Due process, they argued, requires only that an education institution grant handicapped students the *time* that is reasonably necessary for them to meet new graduation requirements. If a student because of a handicapping condition cannot meet the diploma standard on his 18th birthday, his remedy should be additional time to do so rather than the award of a diploma that was not earned.

The court answered this argument by agreeing in theory, but directing the district to award diplomas to eleven of the fourteen plaintiffs because of hardship. At pages 14 and 15 of the slip opinion, the court states:

> The School District's position is not without merit. Some plaintiffs might have failed the M.C.T. despite decades of preparation; others might have opted out of it even if notified years in advance. By awarding these plaintiffs diplomas, the School District would be putting them in a better position than they would have been in had there been no due process violation. . . .
>
> We agree with the School District that, in theory, the proper remedy for a violation of this kind is to require it to provide free, remedial, special education classes to ensure exposure to the material tested on the M.C.T., and a reasonable opportunity for plaintiffs to learn that material. We take note of the fact that the School District presently offers such courses (Tr. Vol. I, at 143-144), and we advise future handicapped students

to bypass the courts and enroll in those courses when necessary. In this particular case however it is unrealistic to assume that eleven of these plaintiffs would be able to return to school without undue hardship. Consequently, the School District may not require those plaintiffs to pass the M.C.T. as a prerequisite for a diploma.

CONCLUSION

Both handicapped and non-handicapped students who fail to meet legally valid graduation requirements may be denied standard diplomas. If handicapped students are awarded standard diplomas that they did not earn, then students without handicaps who are subjected to graduation standards that they did not meet may seek to be stigmatized as "handicapped." This "Orwellian" result portends a future described in the fiction of Kurt Vonnegut, Jr.:

> The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the increasing vigilance of agents of the United States Handicapper General.[38]

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[38] Harrison Bergeron, Fantasy and Science Fiction Magazine (1961).

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Creation Science in the Public Schools

DAVID A. HAMILTON*

David A. Hamilton is an attorney in private law practice in Baton Rouge, Louisiana with the law firm of Hamilton & Mayer. He received his Juris Doctorate from Louisiana State University Law School. Mr. Hamilton has a background as a teacher in primary and secondary schools, state legislative experience in several capacities as well as serving as an administrative officer and legal counsel for Louisiana Department of Education. He has conducted school law workshops and acted as presenter and panelist on many conferences and meetings concerning legal education.

Charles Darwin's *On the Origin of Species* (1859) began the modern battle in the Western World over the origins of man and the universe. Probably the first manifestation of this in our country occurred in the historic *Scopes* trial. The Tennessee legislature passed a law prohibiting the teaching of evolution or evolutionary theory in the public schools. In an effort to expose his students to all current ideas, Mr. Scopes discussed evolutionary theory in his high school science classroom. As a result, criminal prosecution was brought against him. Scopes was convicted of teaching evolution, but it should be clearly understood that whether or not evolution or creation was correct was not the issue. The Court found that Mr. Scopes had been teaching evolution and had therefore violated the law, making him guilty. Although the conviction was later overturned on a technicality, Scopes became a *cause celebre* for Clarence Darrow, and significantly contributed to the growth, popularity, and notoriety of the American Civil Liberties Union.

In 1968 the United States Supreme Court decided *Epperson v. Arkansas.*[1] An Arkansas statute which excluded Darwinian theory from the high school science curriculum was found unconstitutional because the court found that the exclusion was religiously motivated. *Epperson* stands for the principle that an attempt to include or exclude any topic in a public school curriculum for purely religious reasons violates the first amendment. *Epperson* did not address the nature of either evolution or creation science as a scientific theory.

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[1] Epperson v. Arkansas, 393 U.S. 97 (1968).

Both before and after the *Epperson* decision, the United States Supreme Court had on numerous occasions dealt with the separation of church and state question presented by the first amendment. In *Engel v. Vitale*,[2] the Supreme Court invalidated a local board of education requirement that school principals in the district cause a prayer to be read aloud by each class in the presence of the teacher at the beginning of every school day. The Court determined that the prayer was at least theistic in nature, and as such constituted an establishment of religion in violation of the first amendment. In its analysis of the purpose of the first amendment, the court made a statement (quoted by the district court in *McLean v. Arkansas*)[3] which appears to be a clear enunciation of the philosophical intent of the first amendment. In *Engel*, the Court stated: "But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[4]

Within less than a year, the United States Supreme Court again decided the issue of school prayer. In *School District of Abington Township, Pennsylvania v. Schempp*,[5] the Supreme Court dealt with Bible reading in public schools. Two statutes were involved, one a Pennsylvania law providing for Bible reading in public schools and the other a local rule requiring Bible reading or recitation of the Lord's Prayer as opening exercise in public schools in Maryland. The Court found both unconstitutional under the first amendment. Most of the Court's opinion seems to be quotations from previous cases in the area of the first amendment.

There are a couple of interesting quotations in *Schempp*. First, the Court includes in its opinion a quotation from *Zorach v. Clauson*[6] concerning the "philosophy" of the first amendment. In *Schempp*, the Court quotes *Zorach* as follows:

> The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, in which there shall be

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[2] Engel v. Vitale, 370 U.S. 421 (1962).
[3] McLean v. Arkansas, 529 F. Supp. 1255 (D. Ark. 1981).
[4] Engel v. Vitale, 370 U.S. 421 (1962) at 431.
[5] School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963).
[6] Zorach v. Clauson, 343 U.S. 306 (1952).

> no concert or union or dependency one on the other. That is the *common sense* of the matter. 343 U.S. at 312. (Emphasis supplied)[7]

It is this last sentence which is particularly intriguing, because it seems to be an oxymoron. Does the Court indicate that first amendment issues will be decided on the basis of "common sense"? This is at best a vague standard.

Another interesting aspect of *Schempp* was a discussion by the Court concerning the use of the Bible in public schools. The Court wanted to make it clear that it was not banning the Bible from the public schools, but was merely discussing the inappropriate use of the Bible. The Court clearly indicated that the Bible, along with other religious writings, could be used as part of the public school curriculum, but not for purely religious purposes by stating:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[8]

While the use of the Bible is not absolutely prohibited in public schools, such use must be objective and part of a secular program of education.

Probably the most important case in the area of the first amendment is *Lemon v. Kurtzman*,[9] decided by the United States Supreme Court in 1971, involving a challenge to certain types of statutory state aid to nonpublic schools from Pennsylvania and Rhode Island. The statutes reimbursed nonpublic school's by paying money to the schools for actual expenditures for teachers' salaries, textbooks, and instructional materials. It was factually established that the vast majority of the schools eligible for such aid in both Rhode Island and Pennsylvania were Roman Catholic. Very early in the opinion, Chief Justice Berger set forth a "checklist." He summarized the tests which the Court had developed over many years in regard to the constitutionality of statutes involving church-state relations:

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[7] School Dist. of Abington Twp., Pa. v. Schempp, 373 U.S. 203 (1962) at 220.

[8] *Id.* at 225.

[9] Lemon v. Kurtzman, 403 U.S. 602 (1971).

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." (Citations omitted)[10]

The Court proceeded to analyze the challenged statute in the light of these three tests.

In regard to the secular legislative purpose and the principal or primary effect of the statute, the Court found that there was no reason to doubt the legislature's legitimate secular intent. The Court found that the purpose of the statutes was to enhance the quality of all schools covered by the compulsory attendance laws, and that there was no attempt by the legislature to either advance or inhibit religion. The Court noted the fact that there was no evidence introduced which undermined the legislative intent as stated in the statutes, and therefore, felt that this statement of intent should be ". . . accorded appropriate deference."[11] However, the Court found that the statutes failed the third test, that of excessive entanglement. The Court was clearly of the opinion that the theory of the statutes was appropriate, but the implementation of them was their fatal defect. First of all, the Court stated:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.[12]

It then went on to point out that these statutes clearly violated this "blurred, indistinct and variable barrier," stating:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid the state provides, and the resulting relationship between the government and religious authorities.[13]

It then went on to analyze the statutes in light of this test. Since the nonpublic schools were Roman Catholic, the Court found that the monitoring of these religious schools which would be required in order to insure that state funds would not be used for religious purposes would require that government officials constantly monitor the operations of the school, including auditing books and tracing all the money that came into the school from the state in order to insure that it was not used to advance religion. The Court summed up its opinion that the programs violated the excessive entanglement test by stating: "As we noted earlier, the very restrictions and surveillance necessary to insure that teachers play a strictly nonideological role give rise to entanglement between church and state."[14]

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[10] *Id.* at 612, 613.
[11] *Id.* at 613.
[12] *Id.* at 614.
[13] *Id.* at 615.

The Court also discussed the entanglement problems which could arise by the devisive political potential of these laws. It pointed out that political division along religious lines was one of the principal evils against which the first amendment was intended to protect, and also pointed out that anyone who thought the community would not divide over the issues along religious lines was being unrealistic. For these reasons, the Court voided both statutes on the grounds that they would foster excessive government entanglement with religion.

In *Committee for Public Education and Religious Liberty v. Regan*,[15] decided nine years after *Lemon*, the Court analyzed a New York statute which provided public funds to nonpublic schools for performing various testing and reporting services mandated by state law. In its analysis, the Court found this statute to be constitutional. The same is true of *Wolman v. Walter*,[16] which involved an Ohio statute designed to provide aid to public schools. The Court went through that statute item by item and found some forms of aid to be constitutional, others to be unconstitutional, and still others to be constitutional if provided in a particular manner. There are numerous other cases in the first amendment area, all of which lead to the conclusion that the wall of separation between church and state is a blurr, not a distinct line. It also leads to the conclusion that the United States Supreme Court will not set any "hard and fast rules" in regard to the very delicate nature of church-state relations. Nonetheless, guiding standards can be seen in the "three prong test" of *Lemon*. While it may not provide as much guidance as many legislators, educators, lawyers, and citizens would like, the test does provide some guidance which can be of use in analyzing delicate questions of church-state relationships.

The three prong test of *Lemon* was used in *McLean v. Arkansas*,[17] the district court case analyzing the Arkansas Balanced Treatment Act.[18] In that Act, the state legislature mandated a balanced treatment for creation science and evolution science. The district court analyzed the statute in light of the three prong test of *Lemon*. First of all, in regard to the intent, the statute provided a declaration of purpose which in essence stated that the Act was designed to protect academic freedom for differing values and beliefs; ensure neutrality toward the students' religious convictions; ensure freedom of religion; guarantee freedom of belief and speech; prevent "the establishment of Theologically Liberal, Humanist, Nontheist [Nonatheist], or Atheist religions"[19]; prevent discrimination against students on the basis of their personal beliefs concerning origins; and assist students in their search for truth. The legislature specifically stated that the Act was not intended to cause instruction in religion or establish a religion. The Act also prohibited any religious instruction or reference to a use of religious writings in the teaching of creation science and evolution science, limiting the balanced treatment to scientific evidences and inferences from those evidences.

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[14] *Id.* at 620, 621.

[15] Committee for Pub. Educ. v. Regan. 444 U.S. 646 (1980).

[16] Wolman v. Walter, 433 U.S. 229 (1977).

[17] McLean v. Arkansas, 529 F. Supp. 1255 (D. Ark. 1981).

[18] Ark Stat Ann §§ 80-1663, *et seq.* (1981 Supp.)

Despite this specific legislative intent, the district court refused to accept these intents and prohibition sections of the law as proof of the secular purpose of the legislation. Judge Overton held that courts were not bound by legislative statements of purpose or statutory disclaimers, but could consider such things as the specific sequence of events leading to the passage of the law, departures from normal procedures, and contemporaneous statements of legislative sponsors in order to determine the legislative purpose of the statute. He then analyzed the "unusual circumstances surrounding the passage of the Act" and found that the state failed to produce any evidence which would warrant a conclusion that at any point in the process anyone considered a legitimate educational value of the Act.

Continuing the analysis of intent, the district court found that six specific scientific evidences and related inferences for creation science listed in the statute tracked almost literally the language in the book of Genesis, stating further that the six evidences which track the language of Genesis were unique to Genesis. He concluded that despite the statements of legislative secular intent and prohibition against entanglement, the statute did not have a valid secular purpose and hence failed the first prong of the *Lemon* test.

The district court then went into a lengthy analysis of whether or not creation science qualified as a science. The conclusion was that it absolutely did not. This analysis included a study of the correspondence among the creation science proponents and an analysis of scientific evidences and inferences drawn therefrom in terms of what constitutes a science. The court was especially concerned with the fact that all of the proofs in support of creation science consisted almost entirely of efforts to discredit evolution

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[19] *Id.*, §§ 80-1666(a).

> through a rehash of data and theories which have been before the scientific community for decades. The arguments asserted by creationists are not based upon new scientific evidence or laboratory data which has been ignored by the scientific community.[20]

The court concluded that since creation science was not a science "[t]he conclusion is inescapable that the *only* real effect of Act 590 is the advancement of religion." (Emphasis in original)[21] The district court found not only that there was no valid secular purpose to the Act, but that it also advanced religion by mandating the teaching of a theory of origins unique to Christianity.

The analysis of the district court did not stop there. Despite the fact that failure to meet any of the three prongs of the *Lemon* test would invalidate a statute, the district court analyzed it in terms of the final test, that of excessive entanglement. The court summed up its opinion in regard to that by stating:

> The need to monitor classroom discussion in order to uphold the Act's prohibition against religious instruction will necessarily involve administrators in questions concerning religion. These continuing involvements of state officials and questions and issues of religion create an excessive and prohibited entanglement with religion. (Citations omitted)[22]

Finally, the district court dealt with another question raised by the proponents of creation science; that evolution was a religion, and therefore, it needed to be balanced by the introduction of creation science. The district court totally rejected the idea that evolution is a religion, and stated that if creation science is in fact a science and not a religion, it is impossible to see how the teaching of a science could neutralize the teaching of religion. However, in order to answer the allegation, Judge Overton stated:

> Assuming for the purpose of argument, however, that evolution is a religion or religious tenet, the remedy is to stop the teaching of evolution; not establish another religion in opposition to it. Yet is is clearly established in the case law, *and perhaps also in common sense,* that evolution is not a religion

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[20] McLean v. Arkansas, 529 F. Supp. 1255 (D. Ark. 1981) at 1270.

[21] *Id.* at 1272.

[22] *Id.*

> and that teaching evolution does not violate the establishment clause. (Numerous citations omitted) (Emphasis supplied)[23]

In summary, the district court in *McLean* determined that Arkansas' Balanced Treatment Act was not constitutional because it failed to meet all three of the *Lemon* tests. It further found that evolution is not a religion, and that creation science is not a science. There has been considerable discussion of Judge Overton's opinion in this regard, and many observers and commentators are legitimately concerned with what might appear to be a censorship of ideas, in that Overton determined what was and was not a science. It is the opinion of this writer that such a determination was legitimately made, because the judge reviewed the commonly accepted criteria for a science and tested creation science against these principals. The analysis is quite good, and makes good reading for anyone who feels that there may be a problem with the "censorships of ideas." Judge Overton himself solved this problem when he stated: "In a free society, knowledge does not require the imprimatur of legislation in order to become science."[24] This statement alone may be dispositive of the whole creation science balanced treatment issue, because it is based upon reality, upon the "common sense" of *Zorach*, quoted in *Schempp*, applied in *Lemon* and *McLean*. It is the key to the whole issue of balanced treatment.

Subsequent to the enactment of the Arkansas Balanced Treatment Act and prior to the *McLean* trial, the 1981 Regular Session of the Louisiana Legislature passed and the governor signed a balanced treatment act.[25] It mandated that balanced treatment of creation science and evolution science commence with the 1982-83 school year. In December 1981, the Attorney General of Louisiana, on behalf of numerous plaintiffs, including legislators who authored or voted for the Balanced Treatment Act, private citizens, parents, scientists, and others, filed suit to compel the superintendent of education to implement the statute.[26] Almost simultaneously, the American Civil Liberties Union, on behalf of numerous plaintiffs, including the same general sampling of individuals with the exception of legislators as found in the attorney general's case, filed suit in the Federal District Court for the Eastern District of Louisiana seeking to void the statute on the grounds that it violated the first amendment to the United States Constitution, that it was unconstitutionally vague, and that it violated academic freedom.[27] *Keith* has been dismissed on jurisdictional grounds, but the district court has yet to provide written reasons for the dismissal. This precludes any appeal decision in the matter, meaning that the case is not finally disposed of. *Aguillard* had been stayed pending the final determination in *Keith*. Since the decision to dismiss *Keith*, *Aguillard* has been reopened for the limited purpose of disposing of any and all pretrial motions, one of which will be discussed later.

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[23] *Id.* at 1274.
[24] *Id.* at 1267.
[25] La. Rev. Stat. Ann. (West 1981) § 17:286.1, *et seq.*
[26] Keith v. Louisiana Dept. of Educ., No. 81-989-B (M.D. La. 1981).

Before this discussion, it is necessary to compare the Louisiana statute to the Arkansas statute. The statutes are very similar, except that the Louisiana statute does not list specific scientific evidences and inferences for either creation science or evolution science in contrast to the Arkansas statute. It does contain similar, if not identical, statements of purpose and clarifications in an effort to remedy the intent problems discussed above in the *McLean* case. Finally, unlike the Arkansas statute, the Louisiana statute mandates the use of existing funds to provide inservice training to teachers and use of existing funds for acquisition of materials of instruction, and provides that the curriculum shall be developed by the local education authorities (local school boards) with the assistance of a panel of seven creation scientists appointed by the governor. To date, no court in Louisiana has considered the first amendment problems presented by Louisiana's Balanced Treatment Act. The cases have been tied up in procedural and pretrial activities.

The involvement of the American Civil Liberties Union in both cases and *McLean* has provided a continuous and consistent treatment of the issues. Numerous depositions have been taken in regard to the Louisiana statute for *Keith*, but they will be useful in the litigation of *Aguillard*. One of the things which stands out very clearly from the depositions and pretrial activities in the Louisiana case is that the proponents of creation science have endeavored to remove any suggestion of a religious basis for creation science. The depositions are too numerous and lengthy to quote here, but they clearly indicate that the proponents of creation science clearly understand the fatal flaws discerned by the *McLean* court, and are now making every effort to neutralize these problems by establishing creation science as a legitimate science, even going so far as to state that belief in creation does not mandate or require a belief in God, but only a belief in a creator, and stating that there are currently no textbooks or materials of instruction available in creation science which are suitable for use in the public schools. It is entirely possible that this particular version of balanced treatment may be found constitutional by the courts, but these federal constitutional questions cannot be addressed until the federal court hears a suit on its merit, assuming that this will be done.

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[27] Aguillard v. Treen, No. 81-4787 (M.D. La. 1981).

This leads to the most interesting issue of the Louisiana litigation. After realigning as a party plaintiff, the Louisiana State Board of Elementary and Secondary Education (BESE) filed a motion for summary judgment in the *Aguillard* case, alleging that the Balanced Treatment Act is unconstitutional under the 1974 Louisiana Constitution. BESE alleges that the provisions of article VIII, sections 1 and 3 of the 1974 Louisiana Constitution, vest in it sole constitutional authority to determine the curriculum and its content for the public schools of the State of Louisiana. BESE contrasts the language of Section 1:

> Section 1. The legislature shall provide for the education of the people of this state and shall *establish* and *maintain* a public education system. (Emphasis supplied)[28]

with the provisions of article VIII, section 3, which provides:

> Section 3(A). The State Board of Elementary and Secondary Education . . . shall *supervise* and *control* the public elementary and secondary schools. (Emphasis supplied)[29]

BESE alleges that this clearly vests in it the sole discretion over policy matters, and that a determination of curriculum is a policy matter. BESE cites the verbatim transcripts of the debates at the Constitutional Convention in 1974, both on the floor and in the education committee, which clearly establish the intent of the framers that the policy decisions in elementary and secondary education should be removed from the vagaries of the political process in order to ensure consistent policy, a situation which was not true under the previous Louisiana Constitution. BESE alleges that the legislature does not have the authority to invade its sole constitutional perogative to determine policy for public elementary and secondary education, and this policy perogative includes curriculum decisions.

The Louisiana Supreme Court has spoken somewhat to this issue in *BESE v. Nix*,[30] decided in 1977. In that decision, the court analyzed the provisions of two legislative acts, one of which assigned specific administrative duties to the superintendent of education, and the other, the general appropriations bill, which appropriated money to the department of education for use by BESE. BESE alleged that this was an unconstitutional invasion of its policy-making authority, and furthermore, that the appropriation to the department for the board in essence prevented the board from performing its constitutionally mandated duties.

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[28] LA. CONST.. art. VIII, § 1 (1974).

[29] *Id.* § 3(A) (1974).

[30] BESE v. Nix, 347 So. 2d 147 (La. 1977).

The court concluded that the act delegating to the superintendent certain administrative duties was constitutional, because the constitution clearly provided that the legislature had the authority to delegate administrative duties to the superintendent. It found the appropriation constitutional, so long as the department of education did not interfere with the operations of the board by failing to properly allow the board to spend the money appropriated for it. Of interest in the case is the court's analysis of the relationship among the legislature, the department of education and its superintendent, and the BESE.

After considering the record of the constitutional convention debates and the history of Louisiana education, the court found that BESE is the sole constitutional authority to supervise and control the public elementary and secondary schools in Louisiana, and therefore, any act which would strip the board of this policy-making function is unconstitutional. The court found:

> A proper construction of the Article does, as the trial court held, permit a holding that the Board possesses the constitutional power to decide educational policy as to matters within its jurisdiction.[31]
>
> . . . .
>
> [I]n view of the constitutional intent to confer ultimate policy-making power upon the board, the legislature may not in the guise of administrative regulation deprive the board of its constitutional policy-making duties and powers.[32]

The court discussed the general principal of the judicial interpretation of a state constitution, that it is not a grant of power, but instead a limitation on the otherwise plenary power of the people of the state as it is exercised through the legislature. The court concluded that because of the above language in the constitution, the legislature could not strip BESE of its policy-making authority.

What will this mean in *Aguillard*? By the time this is published, a decision on this motion for summary judgment will probably have been made. The only real thing that is still being debated is whether or not curriculum is "policy." The answer will determine whether or not the Balanced Treatment Act is constitutional under the 1974 Louisiana Constitution.

Can creation science be taught in public schools? The answer to this question is a qualified yes. First, if it is taught as a science, "Common sense" requires it be subjected to the scientific method. One commentator has stated:

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[31] *Id.* at 151.

[32] *Id.* at 152, 153.

> If, in fact, creationist theory is included in science classes for secular reasons, then it too should be subjected to critical inquiry, following the rules of science. On such a basis, it would seem legitimate to include it, even in a science course. Those who seek to have creationist theory included for religious reasons would undoubtedly balk at having it subjected to critical inquiry. (Indeed, they would have a solid ground for obtaining excusal from this course of study.) Those who seek to include it for secular education reasons should not be upset by critical inquiry. Indeed, the presence of critical inquiry would make an excellent test for the establishment clause when applied to concepts to be included in the curriculum.[33]

On the other hand, the Bible can certainly be used as part of a general survey course on theories of origins or a study of comparative religions, and other situations contemplated by *Schempp*. However, it appears from the record that the proponents of creation science want it taught alongside the theory of evolution, granted the same legitimacy accorded other sciences (none of which have a statutory mandate of such status as a science), but not subjected to scientific inquiry in the "common sense" of that term.

It is entirely possible that the federal constitutional questions involved in the delicate areas of church-state relations will not be decided in the test of the Louisiana Balanced Treatment Act. If these issues were tried, there is very little "common sense" reason to doubt that the Balanced Treatment Act would fail on all three prongs of the *Lemon* test. The federal court in the *Aguillard* case may find the statute unconstitutional under the Louisiana State Constitution of 1974 and the Louisiana Supreme Court decision of *BESE v. Nix*. This will enable the courts to avoid a potentially sticky and sensitive issue. In short, it appears that litigation raising issues which would probably divide our national community (which interestingly enough may be reason to void the balanced treatment theory on federal constitutional grounds alone) may be avoided by settling the issue on state constituional grounds. This decision will not end the controversy, but it is doubtful, even with "common sense" that the creation-evolution, religion-science debate will ever end.*

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[33] ANALYSIS (ECS Monograph Jan. 1981) at 36.

* EDITOR'S NOTE: Prior to publication, the federal district court rendered its decision in *Aguillard*. The court held the act unconstitutional on state grounds and that the state board of education has sole power to make such curriculum decisions.

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4

Determining Causality by Inference: The Use of Statistics in the Courtroom

DAVID G. CARTER, SR., J. JOHN HARRIS III AND RICHARD E. FIELDS

Dr. Carter is currently the Associate Vice President of Academic Affairs, University of Connecticut, Storrs, Connecticut. He also holds membership in the Department of Educational Administration as Professor. The author of numerous articles on educational administration, he also served as consultant to the Syracuse University Research Corporation, the Title I Study for the National Institute of Education, and other educational projects. He received his Ph.D. degree from Ohio State University in 1971.

J. John Harris III is Associate Professor at School of Education, Department of School Administration, Indiana University, where his responsibilities include teaching and counseling students for higher education degrees. He has spent considerable time and effort in roles of contributor, consultant, presenter and director of school related projects and services. He has written articles and made presentations on many school law subjects and is indeed a true leader in the educational field. He received his Ph.D. degree from the University of Michigan.

Richard E. Fields is a practicing School Administrator in the Indianapolis Public Schools where he has a chance to observe and practice the many theories advanced for better education. He has spent time and energy studying and writing about school law with resulting good effects.

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or conscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed.[1]

INTRODUCTION

The role of social science research and use of statistics in judicial proceedings have attracted attention for more than twenty-five years.

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[1] O. HOLMES, JR., THE COMMON LAW (1881) at 1.

Over that time social science research and statistics have found their way into the legal process. It does not overstate matters to say that social science research has had a profound impact upon the nation's educational policies, particularly since the *Brown v. Board of Education* decision,[2] and that statistics have been used to prove discrimination in employment,[3] jury selection,[4] school systems,[5] and voting rights cases.[6]

As a result of this growing use, researchers, scholars, lawyers, legislators, and interested policy makers have started to seek an understanding of social science research and statistical data as they affect the outcome of judicial decisions.

To date, questions have been raised concerning the potential for the abuse of statistics. "Statistics can be exaggerated, oversimplified or distorted to create support for a position that is not otherwise supported by the evidence. Samples with built-in biases, unqualified statements of 'average' values, and improper mathematical operations with statistics are areas of statistical manipulation that can misrepresent the data."[7] The courts have held that statistical evidence is not irrefutable and that its value depends on the specific fact situation.[8]

Although the courts have come to rely increasingly on social science research and statistical data, the writers' purpose is limited to an historical overview of the judicial use of social science research and statistical data. In the course of the chapter, they plan to address three questions: (1) To what extent has social science influenced or had a role in judicial decision making? (2) What has been the evolution of the use of statistics in the courtroom? (3) And, finally, what place will statistics play in the future in shaping judicial decisions?

SOCIAL SCIENCE RESEARCH

The relationship between the social sciences and the law can be traced to a statement made by Justice Oliver W. Holmes, Jr.: "The life of the law has not been logic; it has been experience."[9] Holmes, according to Lochner, "thought it best that the law should be subject to study and examination by those who presumably knew more about social reality than did the judges—perhaps by social scientists."[10]

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[2] 147 U.S. 483 (1954).

[3] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[4] Castaneda v. Partida, 430 U.S. 482 (1977).

[5] Board of Education v. Harris, 444 U.S. 130 (1979).

[6] Alabama v. United States, 403 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962).

[7] C. Egli, *Judicial Refinement of Statistical Evidence in Title VII Cases*, 13 CONN. L. REV. 525-526 (Spring 1981).

[8] International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 (1977).

[9] HOLMES, *supra* note 1.

Contrary to the popular assumption, the use of social scientists as expert witnesses in judicial matters is not new; they have been called into legal proceedings for some time. Social science findings have frequently influenced public policy or equity decisions. The writers' purpose in this section is simply to review court cases outside the field of education where social science data have received consideration.

Social science data began to be introduced into the courts in the first third of the twentieth century in an effort to determine whether the states had the right to pass economic and social welfare legislation. With the recognition of the significance of these data by the courts, protective social legislation as we know it today became a reality.[11] As a result, an entire school of jurisprudence (dubbed "Sociological Jurisprudence" by Roscoe Pound in 1911) has arisen, based upon this judicial recognition of the influence of social science factors.[12]

The use of medical and social science data by Justice Harlan, who wrote the majority opinion in *Lochner v. New York*,[13] represented an early instance of adopting "nonlegal material"[14] as precedent in the legal process. The case of *Muller v. Oregon*[15] followed closely after *Lochner*. In *Muller* the United States Supreme Court addressed itself to the constitutionality of an Oregon statute that limited the maximum hours of employment for women. In violation of the statute, the manager of a laundry required females to work more than ten hours a day. The state's right to regulate the working hours of women rested on its policy power and the right to preserve the health of the women of the state. In this case Louis Brandeis filed what has come to be called the "Brandeis Brief," favoring the constitutionality of the statute under question. Brandeis supported his position by relying upon such sources as surveys, factory reports, medical opinions, employee and employer interviews, governmental reports, and various statistics.[16]

In *Shelley v. Kraemer*,[17] which is a companion case to *McGhee v. Sipes*,[18] the question addressed is whether private agreements made with the express purpose of excluding persons of designated race or color from the use or occupancy of real estate for residential purposes violated the fourteenth amendment. Although it was not readily apparent, sociological data were introduced at practically every crucial step in the legal process, beginning with the trial court arguments to the United States Supreme Court in *Shelley v. Kraemer* and *Hurd v. Hodge*,[19] both of which invited the Court to develop a "new legal rule for these cases."[20] The social science data also were offered to depict the negative effects racial ghettos have on those residing therein. There followed a whole chain of cases in which social science research was introduced in court proceedings—cases concerned with such issues as the rights of juvenile delinquents,[21] capital punishment,[22] legal insanity rules,[23] illegal use of test examinations,[24] obscene literature,[25] and racial discrimination.[26] But the area that has received the most attention has been school discrimination cases.

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[10] P. Lochner, Jr., *Some Limits on the Application of Social Science Research in the Legal Process*, LAW AND THE SOCIAL ORDER 816 (Summer 1978).

[11] W. DOYLE, *Social Science Evidence in Court Cases*, EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS 11 (1977).

[12] *Id.*

[13] 198 U.S. 45 (1905).

[14] B. Levin & P. Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW AND CONTEMPORARY PROBLEMS 50 (Winter 1975).

[15] 208 U.S. 412 (1908).

[16] *Id.*

[17] 334 U.S. 1 (1948).

[18] *Id.*

STATISTICAL INFERENCES: CAN NUMBERS BE TRUSTED?

The use of statistics forms a useful social science tool in the consideration of whether defendants in discrimination cases did engage in discriminatory practices. The use of statistics has generally been limited to either demographic or comparative comparisons. Demographic statistics compare the difference in the sex, age, or racial composition of the employer's work force with the availability of the same groups in the work force of the general population. Demographic statistical comparisons relying on the disparate impact theory have been used to show a prima facie case of discrimination. When a difference is significant, it adds to the inference that the questionable practice created the disparity. The limitations of demographic statistics are such that data from comparative statistical comparisons are sometimes used to refute the results from demographic data. On the other hand, comparative statistics compare the representation of a particular group among the total applicants of that group, either actual or potential, with the representation of that group among successful applicants. Comparative statistical comparisons have been used to argue against company hiring and promotion criteria. The data simply show the success and failure of the protected group in question who participated in the given employment practice. In *Dothard*,[27] the United States Supreme Court made clear that when data were not available, predicted data would be considered if a gross statistical disparity existed.[28] According to the Court such data are necessary because some individuals may have been discouraged by the practice under challenge or realized that they lacked the ability to meet successfully the requirement. Keep in mind that while the disparate impact of a given employment practice on a protected group can be determined by comparison statistical studies, "demographic statistics can only establish an inference."[29]

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[19] 334 U.S. at 24.

[20] J. Kohn, *Social Psychological Data, Legislative Fact and Constitutional Law*, 29 GEO. WASH. L. REV. 137 (Oct. 1960).

[21] *In re* Gault, 387 U.S. 1 (1966).

[22] Furman v. Georgia, 408 U.S. 238 (1972).

[23] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[24] Griggs, *supra* note 3.

[25] Commonwealth v. Esenstadt, 62 N.E. 840 (Mass. 1945).

[26] Perez v. Liptold, 198 P.2d 17 (Cal. 1948).

It was not until 1977 that the United States Supreme Court rendered a decision that addressed the issue of relevant statistical evidence in three Title VII cases: *Teamsters*,[30] *Dothard*,[31] and *Hazelwood*.[32] "Statistics also can determine whether disparities in the form of an underrepresentation of minority group members in particular jobs or differences in pay, benefits, or conditions of employment can be attributed solely to chance factors."[33] Statistical evidence has also been used with varying results in a variety of Title VII cases. Such cases concern preemployment requirements,[34] failure to hire,[35] no-transfer rules,[36] unlawful seniority systems,[37] closed recruitment systems,[38] affirmative action plans,[39] and union discrimination in membership.[40]

The use of statistical evidence in discrimination litigation is based on the disparate impact theory. This theory seeks to question employment practices that appear to be neutral but that result in having a disproportionate impact on a select group, depriving its members of their right to equal employment opportunity, which is in violation of

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[27] Dothard v. Rawlinson, 433 U.S. 321 (1977).

[28] *Id.* at 330.

[29] Eglie, *supra* note 7 at 524.

[30] Teamsters, *supra* note 8.

[31] Dothard, *supra* note 27.

[32] Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

[33] L. Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59-60 (Sept. 1980).

[34] Lightfoot v. Board of Trustees, 457 F. Supp. 135 (D. Me. 1978).

[35] New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

[36] Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (1970), *cert. denied*, 401 U.S. 954 (1971).

[37] Teamsters, *supra* note 8.

[38] United States v. County of Fairfax, 629 F.2d 932 (4th Cir. 1980).

[39] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[40] United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

Title VII. In such a case, *Griggs*,[41] the plaintiffs had to prove a significant disparate impact due to the selection procedure. The burden of proof then shifts to the defendant to establish a business necessity by showing that the challenged procedure is job related.

When a plaintiff brings a challenge alleging employment discrimination under Title VII, the thought behind the claim is that there has been either disparate impact or disparate treatment.[42] Treatment means that "the employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."[43] Impact, on the other hand, concerns "employment practices that are facially neutral . . . but that in fact fall more harshly on one group than another."[44]

Judicial support for the use of statistical evidence was provided in *Griggs*.[45] In this class action suit brought under Title VII of the Civil Rights Act of 1964,[46] black employees at the Duke Power Company questioned the high school diploma or passing score on intelligence tests as a prerequisite to transfer to any department. According to the Supreme Court, the transfer requirements were "intended to measure the ability to learn to perform a particular job or category of jobs."[47] The Court considered data from the 1960 census that showed that there was a significant difference in North Carolina between white and black males who had completed high school. Other evidence included findings from the Equal Employment Opportunity Commission that in one instance test results revealed that only 6 percent of the blacks compared to 58 percent of the whites passed. Based on this evidence, the Court held that employment practices that disproportionately exclude blacks without being job related are prohibited, "regardless of a lack of discriminatory intent."[48] In so doing, the Court interpreted congressional intent as being concerned with the "consequences of employment practices, not simply the motivation."[49]

The use of statistics in discrimination cases was reaffirmed by the United States Supreme Court when it stated that it had "repeatedly approved the use of statistical proof . . . to establish a prima facie case of racial discrimination in jury selection cases . . . . Statistics are equally competent in proving employment discrimination."[50] In such cases inferences can be made concerning the composition of the work force. This has led to the rule of exclusion, which is when discrimination can be inferred because the composition of the employer's work force did not occur by chance. This rule enables a prima facie case of discrimination to be established by showing that the significant underrepresentation of a particular group did not result from chance. It was in *Castaneda*[51] that the Supreme Court stated:

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[41] Griggs, *supra* note 3.

[42] Teamsters, *supra* note 8 at 335-336.

[43] *Id.*

[44] *Id.*

[45] 401 U.S. at 425-426.

[46] *Id.*

[47] *Id.* at 428.

[48] Egli, *supra* note 7 at 520.

[49] *Id.* at 432.

[50] Teamsters, *supra* note 8 at 339.

> The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.[52]

Although a jury selection case, "the Court's application of the statistical standard deviation method[53] was subsequently followed in *Hazelwood School District v. United States*,[54] an employment discrimination case.[55] According to Egli, when the difference in the standard deviation is two to three times greater than the actual and expected differences in the work force, the hiring procedure would be questionable.

The Supreme Court in *McDonnell Douglas Corporation v. Green*[56] set forth the basis for establishing a prima facie case under the disparate treatment theory. In this case, the plaintiff alleged that because of his race he was treated differently. The Court held that a plaintiff could establish a prima facie case by proving (1) (s)he is a member of a minority group; (2) (s)he was qualified and applied for the job that was being advertised; (3) although qualified (s)he did not get the job; and (4) after (s)he was rejected, the employer continued to seek applicants from among persons of similar qualifications.[57] In cases concerning disparate treatment, the Court has considered statistical evidence as a means for proving a violation.

Although class actions or "pattern or practice" suits represent the kinds of cases where statistical evidence is frequently used, the *Davis v. Califano*[58] case brought the issue of statistical evidence in individual discrimination to the fore. In this case, a chemist with a GS-9 rating, Dr. Barbara Davis, filed suit charging "unlawful" discrimination against her in hiring, promotion, and other conditions of employment,[59] which violated Title VII of the 1964 Civil Rights Act.[60] It was alleged by Davis that male chemists with less time in grade had been promoted at a higher rate, that several times she had been passed over for promotion, and that a particular position had not been offered. The district court dismissed the complaint filed by Davis because she failed to establish a prima facie case concerning discriminatory promotional practices. The decision was reversed, however, and remanded by the Court of Appeals for the District of Columbia Circuit. In its ruling the court held that statistical evidence could be used in individual employment discrimination action to establish a prima facie case. In arriving at its decision, the circuit court of appeals cited class action suits as being typical of the kinds of cases that made use of statistical evidence. "The use of statistical evidence should have equal force and effect in an individual discrimination case."[61]

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[51] Castaneda, *supra* note 4.

[52] *Id.* at 494.

[53] Standard deviation is considered to be the most stable measure of variability. Like the mean, the standard deviation gives a picture of the composition of the population or sample under study and gives a reasonably good description of the nature of the group being studied.

[54] 433 U.S. 299 (1977).

[55] Egli, *supra* note at 522.

[56] 411 U.S. 792 (1973).

[57] *Id.* at 802.

[58] 613 F.2d 957 (D.C. Cir. 1979), *as amended* (Feb. 14, 1980).

STATISTICS: JUDICIAL CURSE OR CURE?

Statistical interpretations are much like the person who went to fetch water but returned with an empty bucket. It is critical that certain checks take place before the data are collected and statistical tools employed. It is so easy to end up with an answer that appears correct but is actually not accurate. The point is that a statistician can fail to eliminate the bias associated with a particular sampling design and the resulting interpretation of the findings. Furthermore, there are a number of areas where care must be taken to ensure against faulty conclusions.

The court in *Hester v. Southern Railway*[62] held that the use of statistics reflective of the general population was inappropriate to question the typing requirement of "60 words per minute," since the general population was "not presumptively qualified."[63] It can be generally concluded that the burden of proof rests with the plaintiff to show that general population data contain a significant number of people qualified for the position in question.

Another area of concern is when one statistical comparison conflicts with another study. In such situations, the courts have compared "the percentage of the protected class among the applicant pool with the percentage of the protected class among the persons hired for the job."[64] This viewpoint was subsequently reinforced in *Furnco Construction Corporation v. Waters*,[65] a case that addressed the issue of disparate impact. According to the Supreme Court, evidence that an employer's work force is balanced racially or contains a disproportionate number of minorities cannot be viewed as being not related to the issue of intent.[66] "[The Court] cannot say that [evidence] would have absolutely no probative value in determining whether otherwise unexplained rejection of the minority applicants was discriminatorily motivated."[67]

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[59] *Id.* at 961.

[60] *The Role of Statistical Evidence in Establishing a Prima Facie Case of Employment Discrimination: Davis v. Califano*, 14 GA. L. REV. 619 (Spring 1980).

[61] 613 F.2d at 963.

[62] 497 F.2d 1374 (5th Cir. 1974).

If statistics are to be of value to a plaintiff's challenge in establishing a *prima facie* case, there is a need to prove the following:

1. Significant disparate impact and "that the population statistics represent the proper geographic area and the qualified and interested labor market."[68]
2. Work force data concern the geographic area from which each employee comes.[69]
3. Statistical work force data are limited to the time in question.[70]
4. Disparity in the work force is significantly statistical.[71]

"Lawyers in greater numbers are undoubtedly going to use social scientists where they feel their testimony can help."[72] Thus, the judge must have a procedure by which the research presented can be reviewed for its validity and reliability. The reasoning here is that many officials in the legal profession are, as Judge J. Braxton Craven acknowledged, ignorant of sociology and educational theory.[73] Wolf[74] has pointed out in her research into *Bradley v. Milliken*[75] that one of the real problems in the courtroom is the lack of anyone's being available in a teaching role when statistical evidence is presented. Wolf believes that such a person would help to "clarify, elucidate, reveal misunderstandings, sort out confusions," and would even insure that terms were used consistently and defined by the same speaker.[76] She emphasizes, however, that certain misunderstandings in terms are useful to certain parties to strengthen their own cases, and other parties are often reluctant either to correct a judge or to have to justify certain embarrassing practices on their parts should correction of interpretation later become a topic for scrutiny.

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[64] Egli, *supra* note 7 at 535.
[65] 438 U.S. 567 (1978).
[66] *Id.* at 580.
[67] *Id.* at 538.
[68] *Id.*
[69] *Id.* at 539.
[70] *Id.*
[71] *Id.*
[72] J. Greenberg, *Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation*, 54 MICH. L. REV. 965 (May 1956).
[73] J. Craven, Jr., *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW AND CONTEMPORARY PROBLEMS 154 (Winter 1975).
[74] E. WOLF, EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS 110 (1977).
[75] 338 F. Supp. 582 (E.D. Mich. 1971).

Dawson[77] believes that the major conditions favoring statistical proof in the courtroom are the availability of a statistician who has demonstrated ability in the area under consideration and the availability of data on which the statistician can touch. One other limiting factor, other than cost, is the attitude of the judge toward statistical evidence and his or her willingness to allow experts to express opinions based upon the opinions of others who gathered the data.[78]

Bogen and Falcon[79] expressed the opinion that overwhelming statistical evidence should be sufficient to make a prima facie case for a pattern of discrimination. They define "'overwhelming evidence' as a disparity which occurs by chance less than 2.5 percent of the time."[80]

Schoeman[81] points out, however, that gross disparity discoveries, in light of current laws, are now increasingly rare. Moreover, as cited earlier in *Teamsters*,[82] "Statistics are not irrefutable: they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."[83] And even when the statistics are employed in their proper surroundings, numerous fallacies involving sampling errors or cause and effect accompany the statistical evidence into the courtroom. For example, in the case of *Hazelwood*,[84] the Supreme Court struck down the district court's decision in a discrimination case involving the hiring of black teachers on the grounds that the court had improperly compared the Hazelwood black teaching force to the black student population when it should have compared it to the racial composition of the teacher population in the relevant labor market. Schoeman calls this the fallacy of generalization from irrelevant comparison.[85]

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[76] WOLF, *supra* note 74 at 111.

[77] J. Dawson, *Scientific Investigation of Fact—The Role of the Statistician*, 11 FORUM 899 (Spring 1976).

[78] *Id.* at 899-900.

[79] D. Bogen & R. Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 77 (1974).

[80] *Id.*

[81] S. Schoeman, *Understanding the Role of Statistical Evidence in Equal Employment Opportunity Law*, 54 N.Y. ST. B.J. 137 (April 1982).

[82] 431 U.S. 324 (1977).

[83] *Id.* at 340.

[84] 433 U.S. 299 (1977).

The limitations of social science research are well recognized in the academic community. Social scientists examining and interpreting the findings of a given piece of research must acknowledge their limitations when they leave the academic arena, and particularly when they enter a courtroom, where they must respond to a variety of hypothetical questions, the answers to which may be acted upon pragmatically. In *Dothard* the Court reaffirmed the *Castaneda* ruling concerning the use of standard deviations to determine disparities between observed and intended.[86]

CONCLUSION

"What seemed at first to be antagonism between social science and law has now developed into a love match."[87] What began in fields outside education is now an integral part of the domain in which educators must function. But, if anything has been learned from those initial skirmishes between those relying upon principles of law as extracted from the Constitution and the social scientiests who believed their respective disciplines could provide a new and needed dimension to the legal profession, it is that lawyers and social scientists alike can play valuable roles in the policy-making process.

In *Briggs*, Justice Frankfurter expressed the view that social scientists could help the courts in formulating rules of law when he said:

> Can we not take judicial notice of writing by people who competently deal with these problems? Can I not take judicial notice of Myrdal's book without having him called as a witness? . . . How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of competent writers.[88]

While social science can and should provide a means to the goal of a just society, social scientists should in no way direct the operation of the courts, any more than a judge should feel at ease when interpreting the findings from a complex study submitted as evidence. This word of caution is offered particularly to those who eagerly await the day when "social scientists can advise not only courts, but the people generally; just as physicians, chemists and other physical scientists do today."[89]

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[85] Schoeman, *supra* note 78 at 138.

[86] Dothard, *supra* note 27 at 309.

[87] J. Wisdom, *Random Remarks on the Role of Social Science in the Judicial Decision-Making Process in School Desegregation Cases*, 39 LAW AND CONTEMPORARY PROBLEMS 144 (Winter 1975).

[88] Statement by Judge Frankfurter in *Briggs v. Elliott* during the first reargument of the school segregation cases. *Cited in* Greenberg, *supra* note 72 at 966.

As the debate on what role social scientists should play in judicial proceedings continues, the writers have reason to believe that the courts will be confronted more and more with evaluating the worth of objective and subjective data submitted as evidence. This will be especially true in civil liberties cases. Judges should continue to keep in mind the fact that

> courts may act on social fact and not social fiction, they should seek from the social scientists coherent collections of findings. And scientific evaluation of the strength and significance of these findings for the particular legal problem faced. Lawyers, not scientists, must determine what is relevant in litigation; but scientists, not lawyers, should determine what of the relevant is reliably known.[90]

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[89] Parmelee v. United States, 113 F.2d 729, 737 (D.C. Cir. 1940).

[90] Kohn, *supra* note 20 at 165.

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The Right of the State to Control Church-Related Schools

Ralph D. Mawdsley and Steven Permuth

Dr. Ralph Mawdsley is Professor of School Administration and Administrative Counsel for Liberty Baptist College at Lynchburg, Virginia, where he teaches related courses in law and education at the graduate level. He holds graduate degrees in law, theology, and educational administration and has applied all degrees in his occupational experiences. He has practiced law in the private and public sector. He has lectured and organized many conventions, workshops and conferences and has authored numerous publications.

Dr. Steven Permuth is Dean and Associate Professor of Educational Administration in the College of Education at Bradley University, Peoria, Illinois. He received his Doctor of Education degree from the University of Minnesota. Having taught, lectured, written and participated in numerous educational law projects, Dr. Permuth is highly qualified in the field of school law.

The relationship between states and church-related schools has become increasingly confrontational. Tensions have been exacerbated by a heightened militancy among certain religious groups toward what is perceived as excessive incursions by a state into the organization and operation of their church-related schools. Concomitant with the rise of this increased militancy has developed a philosophical rationale for a militant stance against state intrusions as reflected by one prominent author's summary statement, "The *bottom line* is that at a certain point there is not only the right, but duty, to disobey the state."[1] The difficulty in analyzing the current confrontation regarding state control of church-related schools is that the basic arguments on both sides are not necessarily contradictory, at least on the surface. The state asserts its right under its compulsory attendance law to determine that schools are performing an educative function;[2] whereas church-related schools and the parents of children attending therein assert their free exercise of religion right to direct the education of their children.[3] The state does not normally deny to the parents the primacy of their role in the education of their children nor do church-related schools and parents normally oppose compulsory education and deny to the state its right to promulgate and enforce reasonable regulations.[4] Because conflicts involving state control of church-related schools tend to devolve into a right of the state to control education standards vs. a right of parents to control the education of their children, legal proceedings tend to become highly emotionally charged with judges being asked to choose between one of the two differing approaches. Although judicial resolution involves a balancing of interests in accordance with the requirements established by the United States Supreme Court in *Wisconsin v. Yoder*[5] the final decision very often results in acceptance of either the state's or the church school/parent's position. What is apparently overlooked by courts is that since the state and church school parental positions are not necessarily contradictory, judicial resolutions should not require an either-or approach. The purpose of this chapter is to analyze judicial approaches generally taken to address state attempts to control church-related schools and then propose a solution with a degree of elasticity recognizing the fact that since state and church school/parental approaches are not necessarily conflicting, judicial solutions should be moldable to assure an equitable result.

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[1] F. Schaeffer, A Christian Manifesto 93 (Crossway Books 1981).

[2] *See* J. Moskowitz, 50 Wash. L. Rev. 623 (1975).

VARYING JUDICIAL SOLUTIONS

Courts which have been called upon to balance the interest of a state and a church-related school have generally ruled either for the state or the school. The cases of *State of Nebraska v. Faith Baptist Church*[6] and *State of Ohio v. Whisner*[7] are representative of these two alternatives. To present as a partial middle ground what might be considered to be an innovative attempt to accommodate both the state's and the church school's interests without treating the interests of both sides as necessarily conflicting, the recent case of *State Fire Marshall v. Lee*[8] will be analyzed.

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[3] *See* R. Mawdsley & S. Permuth, *State Regulation of Religious Schools: A Need for Direction*, 11 NOLPE School L.J. 55 (Final Issue 1982).

[4] State v. Shaver, 294 N.W.2d 883, 891 (N.D. 1982). However, in State v. Whisner, 47 Ohio St.2d 750, 758 (1956) the State of Ohio asserted in an expansive manner that "the natural rights of a parent to the custody and control of an infant child are subordinate to the power of the state."

[5] 406 U.S. 205 (1972).

[6] 301 N.W.2d 571 (Neb. 1981).

[7] 351 N.E.2d 571 (Neb. 1981).

[8] 300 N.W.2d 748 (Mich. App. 1980).

Despite the difference in results among the three cases to be discussed all three cases use *Wisconsin v. Yoder* as the basis for litigation resolution. In *Yoder*, Wisconsin's compulsory attendance requirement that all children attend a school between the ages of 7 and 16 was held to "interfere with the freedom of the defendants (parents) to act in accordance with their sincere religious belief."[9] In determining whether state educational requirements impermissibly infringed upon the alleged free exercise of religion rights of church schools and/or parents the *Yoder* Court advanced a threefold test to be used in balancing the interests of both sides: (1) whether or not the activity the state attempts to regulate is motivated by and rooted in a legitimate and sincerely-held religious belief;[10] (2) whether or not the parties' free exercise of religion has been burdened by the regulation and the extent of impact on their religious practices;[11] (3) whether or not the state has a compelling interest in the regulation which justified the burden of free exercise of religion.[12] In finding for the Amish parents the *Yoder* Court restricted its exemption from Wisconsin's compulsory attendance law to fact unique to the Amish community[13] and did not appear to disturb or otherwise limit a decision by an earlier Supreme Court in *Pierce v. Society of Sisters*,[14] where that Court had declared, "no question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."[15] What the *Yoder* Court left unclear and a subject on which the Supreme Court has provided no guidance during the past decade is the extent to which the free exercise of religion defense available to the Amish should be equally applicable to all religious groups and, if equally applicable, the manner in which the threefold *Yoder* test should be interpreted.

The tendency of lower federal and state courts in interpreting and applying the threefold *Yoder* test has been to utilize an either-or approach. If the state can demonstrate a viable "compelling interest" the state wins and the church school/parents lose with an accompanying imposition of civil or criminal penalties; otherwise the church school/parents win and the state regulations, otherwise applicable to public and other private schools, are rendered inapplicable to the church school/parents. The recent case of *State v. Faith Baptist Church*[16] illustrates how this either-or approach functions when the state wins.

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[9] 406 U.S. 205 (1972) at 213.
[10] *Id.* at 215-16.
[11] *Id.* at 217-219.
[12] *Id.* at 219-234.
[13] *Id.* at 219.
[14] 268 U.S. 510 (1925).
[15] *Id.* 534.
[16] 301 N.W.2d 571 (Neb. 1981).

Faith Baptist Church of Louisville, Nebraska began operating its Faith Christian School on August 29, 1977 without first seeking a license from the State Department of Education to operate that school. State licensure is contingent upon meeting minimum requirements regarding curriculum, length of school day and year, health and safety, and filing of periodic reports to verify student attendance. In addition every staff member was required to hold a valid Nebraska certificate issued by the state board of education. After three years of non-licensed operation, Nebraska sought injunctive relief against the church to enjoin the operation of its school. The district court judgment granting injunctive relief was affirmed by the Nebraska Supreme Court. Faith Baptist School was permitted to complete the 1980-81 school year without licensure but when the church opened its school for the 1981-82 school year the judge ordered that the doors of the church be padlocked except for Sunday morning, Sunday evening and Wednesday evening services. Although the church is no longer padlocked the pastor has served 13 days of a 4 month contempt sentence for attempting to begin operation of his school once the doors were unpadlocked.[17] Defendant school has persistently refused to seek approval for its school's curriculum or hire certificated teachers even though state board of education officials assured defendant that the religious-based curriculum would be approved. Defendant has also refused to furnish names and addresses of students in its school for purposes of checking parents' compliance with compulsory attendance laws. Defendant church's rationale as represented by its pastor's testimony can be summarized as follows: First, the Bible mandates Christian education every day of the week, not just on Sunday; second, the public school system with its crime, drug and alcohol addiction problems, teacher assaults, vandalism and disrespect for authority and property is incapable of furnishing the kind of education mandated by the Bible; and third, state department of education officials as representing a philosophy of secular humanism are not capable of evaluating a school program representing a Christian philosophy.[18]

In addressing the critical question of mandated teacher certification the Nebraska Supreme Court justified its conclusion that "the State has a compelling interest in the quality and ability of those who are to teach its young people" by finding "that such a requirement is neither arbitrary nor unreasonable; additionally, we believe it is also a reliable indicator of the probability of success in that particular field."[19] Defendants efforts to compensate for non-licensure by having the students tested annually on a comparative basis with the public schools was brushed aside as "sometimes com[ing] too late."[20] The intransigence of the church and the adamancy of the state have resulted in a judicial opinion with no flexibility; the state wins and the church must experience what can only be termed an unusually harsh penalty. To determine that state requirements are "neither arbitrary nor unreasonable" or are "very minimal in nature"[21] precludes any flexibility in solution as to whether the goal of quality results in education for which the regulations were presumably enacted were not in fact being met by the Christian school in its fourth year of operation. It seems quite probable that a court of equity which could order the padlocking of a school could just as easily have exercised its broad equitable powers to require students to submit to comparative testing more frequently than on an annual basis and to require the state to approve the curriculum without a formal request for licensure.[22] Such a flexible judicial approach would have preserved the parents' alleged religious right to direct the education of their children within a religious-oriented school but also would have preserved the state's interest in assuring that children are in fact being educated.

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[17] Subsequent to submission of this chapter the pastor has been arrested and returned to jail to serve the balance of his 4 month sentence for defying the court's injunction and opening the school for the 1982-83 school year.

[18] 301 N.W.2d 571 (Neb. 1981) at 574.

[19] *Id.* at 579.

The case of *State v. Whisner*[23] illustrates the result when parents and a church school win and the state loses. On December 3, 1973 twelve parents of school-age children were indicted for failure to attend a school "which conforms to the minimum standards prescribed by the state board of education."[24] The defendants were convicted by the trial court and their convictions were affirmed upon appeal to the Court of Appeals for Darke County. The Ohio Supreme Court unanimously reversed the convictions.

The State Board of Education of Ohio had promulgated two sets of regulations, one entitled *Minimum Standards for Elementary Schools of the State of Ohio* and the other entitled *Interpretation and Explanatory Information*. Four provisions of the *Minimum Standards* and four provisions of the *Interpretation and Explanatory Information* were specifically objected to by the parents. The requirements of the *Minimum Standards* and the parental objections are as follows:[25]

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[20] *Id.*

[21] *Id.*

[22] Such a demand by the court of the state that the state approve the curriculum does not seem to be unreasonable since the state acknowledged at the trial that the church school's curriculum was acceptable. *Id.* at 579.

[23] 47 Ohio St.2d 750, 758 (1956).

[24] *Id.* at 752.

[25] *Id.* at 762-763.

(1) Section EDb-401-02(E)(6) required an inspection of the school before a state charter would be granted. The parents did not desire a charter because acceptance of a charter would "constitute their agreement to comply with all standards, and thereby effectively remove their ability to control the direction of the schools by reposing vast powers in the hands of the state."

(2) Section EDb-401-02(G) allocated only 20% of the weekly instructional time to "directed physical education, music, art, special activities and optional applied arts." Defendants objected because the alloted time severely restricted "the ability of the school to incorporate its religious teachings."

(3) Section EDb-401-02(0) provided that all activities in a school should conform to policies of the board of education. Defendants claimed that this would allow public authorites to have virtual control of their school.

(4) Section EDb-401-07 specified "cooperation and interaction between the school and the community" in order to achieve "quality education." Defendants objected because "a Christian school cannot seek its direction from the world or from the community it serves."

The four provisions of the *Interpretation and Explanatory Information* section and the defendant objections were as follows:[26]

(1) Section EDb-401-02(J) prohibited revealing certain kinds of pupil information to parents when a student moved within a school system or outside the system and the pupil records must be forwarded. The defendants objected because parents ought to be apprised of everything occurring in the school relating to his or her child or children.

(2) Section EDb-401-03-(b) declares the philosophy of education which solves common problems through "the consensus of thinking" and which requires that citizens must be "willing to sacrifice for the common good." Such a philosophy was found objectionable because it ignores the resolution of problems through prayer and it is in itself a philosophy of "secular humanism" which is antithetical to the defendants' religious beliefs.

(3) Section EDb-401-03(B) declares that organized group life must act in accordance "with established rules of social relationships and a system of social controls." This was objected to as a philosophy of humanism.

(4) Section EDb-401-03(B) extols the importance of health education in a changing world so that a child can make "reasonably successful adjustments to his many problems." The defendants objected because such an approach ignores God's unchangeable moral values.

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[26] *Id.* at 763.

The opinions of the two lower courts that found against the parent-defendants reflected the application of a "reasonableness" test to the state department regulations. The trial court accepted without comment "the established principle that the natural rights of a parent to the custody and control of an infant child are subordinate to the power of the state. . . ."[27] Neither court was convinced that the defendants had presented a "deeply-rooted religious conviction" sufficient to overcome the reasonableness of the state regulation.[28] "A mode of living, or way of life, however virtuous and admirable, may not be interposed as a barrier to a reasonable state regulation of education if it is based upon philosophical and personal preference rather than upon religious beliefs and convictions."[29] Not being able to demonstrate sufficient evidence of a protectable freedom of religion to overcome the reasonableness of the state regulations the defendants lost in the lower courts.

The Ohio Supreme Court had no difficulty in finding evidence that the defendant's religious beliefs were "truly held."[30] The evidence consisted of the defendants historical-personal religious requirement of "born-again" Christians, a life of separation from worldliness based upon the Bible (Romans 12:2) and the importance of Christian education in inculcating spiritual and moral values into their children.

Having constructed a viable freedom of religion the Supreme Court found the *Minimum Standard for Ohio Elementary Education* and the *Interpretation and Explanatory Information* section unduly burdened the free exercise of defendants' religion. Thus regulations designed to control the operation of schools were rendered unconstitutional as applied to defendants because they interfered with the defendants "rights to pursue their religious beliefs."[31]

As a result of the *Whisner* Court's conclusion that "a general education of a high quality can be achieved by means other than the comprehensive regimentation of *all* academic centers in this state"[32] the religious schools in Ohio were left unregulated. Even though the court chastised both sides in the *Whisner* case for failing to attempt a resolution of differences through "the administrative procedure specifically devised for the purpose of securing a charter from the state to operate a school"[33] it provided no direction for determining which of the state's standards would be permissible as establishing valid "compelling interests." The weakness of the *Whisner* Court's either-or ruling for the church school/parents against the state became evidence four years later in *State v. Olin*[34] when a truancy conviction of a non-Amish parent for placing his child in an Amish school was reversed, not because the state lacked compelling interests or because the parent's religious claims were particularly forceful, but because some of the state's standards were in direct conflict with the parent's religious beliefs and the courts insistence upon considering all Ohio standards as a unit meant that none of the standards were applicable. The *Olin* Court chided the state board of education for failing to adopt "a set of less-restrictive standards" but excused itself because "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."[35] The *Olin* Court would proceed no further than to suggest to the Ohio legislature that reasonable regulations for approval of private or parochial schools might include teacher certification, a prescribed range of secular subjects, and compliance with all fire, health and safety laws. By refusing to determine which of Ohio's existing standards could be applied to church schools and in effect adopt an either-or approach the *Whisner* Court produced a result just the opposite, with differing kinds of inequities, from the prior *Bible Baptist* case, namely operation of church schools with virtual immunity from any state regulation.

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[27] *Id.* at 758.
[28] *Id.*
[29] *Id.* at 759, *quoting from* Wisconsin v. Yoder, 406 U.S. 205 (1972).
[30] *Id.* at 761-762.
[31] *Id.* at 767.
[32] *Id.* at 771.
[33] *Id.* at 772.

A recent third case suggests somewhat of a mid-point between the *Bible Baptist* and *Whisner* cases and further suggests a way out from the inequities of the either-or approach. In *State Fire Marshall v. Lee*[36] a Michigan appeals court had occasion to determine how many of a municipalities' fire and safety regulations applied to a church. In *Lee* the pastor of a school operated as an integral ministry of Liberty Baptist Church was found to be in violation of the state's fire and safety regulations and was ordered to correct the violations. The defendant had purchased three modular classrooms from a public school which had met state requirements for public school classrooms. After defendant had remodeled the modular classrooms for church and church school use the State Department of Education requested that the State Fire Marshall inspect the buildings. The Fire Marshall found basically five violations:[37]

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[34] 64 Ohio St.2d 341, 415 N.E.2d 279 (1980).

[35] *Id.* at 288.

[36] 101 Mich. App. 829, 300 N.W.2d 748 (Mich. Ct. App. 1981).

[37] *Id.* at 750.

(1) No approved fire alarms, (2) Lack of approved stairs, platforms as landings, (3) Failure of the walls . . . to meet a minimum of Class "C" materials, (4) No certificate of electrical approval, (5) No room with at least one hour retarding material for storage of combustible materials.

The defendant alleged at trial a number of improvements including installation of a fire bell, new doors with panic bars, correction of electrical violations, non-storage of combustibles, regular fire drills that enabled students to evacuate the buildings within 12 seconds, installation of handrails and exit lights.

The appeals court reversed the trial courts' order to build a storage closet since combustible materials were not stored at the school. The appeals court remanded the trial court for further evidence as to whether the stairs, platforms or landings and the fire alarm changes met the Fire Marshall's directives. Finally, the appeals court affirmed the trial court's order that the directives regarding electrical and fire retardant wall material improvements be followed. The appeals court noted in reaching its conclusion that "the safety of children is important to our government and equally important to Christians" and "therefore, Christians must comply with the fire and safety regulations which are applicable to *all* schools and which are applied equally to *all* schools."[38] Notwithstanding the existence of fire code regulations and specific code violations the holding of the appeals court that a storage area would not have to be built when defendant had furnished testimony that combustible materials would not be stored on the premises appears to indicate that the purpose of regulatory rules ought to be examined when enforcement of those rules is at issue. If the purpose of fire code regulations is the safety of the school children then alleged code violations which represent no threat to the safety of the children should not be enforced against the school. Such an approach does not suggest that the unenforced regulations are unreasonable on their face but would suggest that enforcement of such regulations might be considered as arbitrary and capricious by a state agency.

Whether enforcement of a regulation where there is no threat to safety of school children would be impermissibly arbitrary involves an understanding of the interplay between the state police power and the free exercise of religion guarantee of the first amendment. In the *Lee* case the defendant did not claim any immunity from the state fire code but did claim that the less stringent church fire code requirements should be applied to his church school rather than the more stringent school code requirements.[39] The defendant reasoned that since the school was a ministry of the church the church regulations should govern. In effect the defendant would appear to be arguing that allowing the state to impose school regulations upon a church would in effect be permitting the state to define a church's ministry. The appeals court responded to the defendant's reasoning with three significant observations. First, the court suggested there might be harassment of defendant by the state where the same buildings which had been used by the public school the previous year and presumably satisfied the fire code were now found to be unsafe. Such a conjecture prompted the court to note, "There would appear from this record to be a different set of standards to be applied to the Linden School District and to the Liberty Baptist Church."[40] Second, the appeals court observed that since "the purpose of the standards is the safety of children"[41] that purpose would appear to have been met by an evacuation time of 12 seconds. "Will a correction of the existing violations speed up the evacuation of the building? This court seriously questions this."[42] Concerning defendant's compliance with the electrical and fire retardant wall requirements the court observed, "we are, in reality, talking about regulations which probably will not speed up the evacuation of the children from the building."[43] Third, the appeals court observed that a number of Bible verses related by defendant during the trial "clearly delineate a Christian's responsibility to obey his government, except where there is direct conflict with his obedience to God. No such conflict appears in the record of this case."[44] In other words, notwithstanding what might be considered inequitable application of state regulations and notwithstanding enforcement of regulations which would probably not contribute to the very purpose for which fire code was enacted, the appeals court appeared willing to enforce rules neutral on their face and otherwise reasonable as long as the church school has no religious tenets that would be denied by enforcement.

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[38] *Id.* at 752.
[39] *Id.* at 750.

The *Lee* decision is significant because by rejecting the either-or approach of the *Bible Baptist* and *Whisner* cases it demonstrates that courts can evaluate individually the regulations under consideration in terms of their accomplishment of a stated purpose. The unfortunate aspect of *Lee* is that the appeals court was not consistent in its reasoning. Whereas the combustible storage room did not have to be built because the absence of combustibles meant no damage to the safety of the children, the electrical and fire-retardant wall requirements had to be satisfied because the defendant had no religious tenet adversely affected by enforcement. Without apparently being aware of it the appeals court has left confusing signals regarding the matter of burden of proof. Burden of proof is composed of two aspects: burden of producing evidence and burden of persuasion.[45] By reversing the trial court's determination that a combustible storage area had to be built the appeals court left unclear whether the state had the burden of producing evidence of a fire code violation hazardous to children and failed as a matter of law in sustaining that burden or whether the state's burden of producing evidence involved only evidence of a specific code violation and the defendant won because he was able to sustain his burden of persuasion that the absence of a combustible storage area would not be hazardous to school children. Likewise, the appeals court's affirming of the trial court's order regarding electrical and fire retardant walls left unclear whether the state won because as a matter of law its burden of producing evidence of a hazardous condition was not countered by defendant's production of sufficient evidence that the purpose of child safety could be satisfied even through noncompliance or whether the state won as a matter of law only because defendant could not produce evidence of a religious tenet violated by enforcement of the fire codes. In other words the church school won in the case of the combustible storage area either because it was able to prove no hazard to children's safety or the state was not able to prove a code violation to be a safety hazard but the church school lost in the case of electrical and fire retardant wall requirements either because it was not able to produce evidence of the absence of safety to school children or because it was unable to demonstrate any harm to its religious distinctions.

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[40] *Id.* at 751.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 752.

While the *Lee* case does indicate that the state can individually evaluate the relationship of a regulation to its stated purpose there appears to be two concluding observations which would be applicable to all state attempts to regulate church schools. First, there is difficulty in determining exactly what is the purpose of a regulation. For example, fire codes for schools would seem at minimum to have two purposes—rapid evacuation of children from schools and retardation of the spread of fire within the school. Where two or more purposes can exist for a set of regulations there is a need for clarity as to whether the two or more purposes are of equal importance for all regulations or whether some regulations are designed to fulfil one purpose only and not others. On this subject the *Lee* Court apparently determined that a combustible storage area was related to retardation of fire and that the absence of combustible materials obviously represented no threat to the spreading of fire. Unfortunately on the matter of electrical and retardant fire requirements the court vacillated by failing to enunciate why those requirements had to be satisfied; apparently rapid evacuation of the building was not the purpose to be furthered. A second concluding observation is that upholding all state regulations against all church schools unless there is a specific religious tenet at stake returns judicial determination to the either-or approach of the *Bible Baptist* and *Whisner* cases with resulting inequities. But perhaps of greater concern is an inevitable heightening of tensions between the state and church-related schools. If state regulatory agencies and state legislatures cannot demonstrate flexibility in recognizing that legitimate educational purposes can be accomplished by different means then courtrooms in our country will increasingly become the scene of an intransigent militancy on both sides. The *Lee* Court has furnished a glimpse of what can be done to fulfil as much as possible the purposes and distinctives of each side, but at the same time reduce a growing feeling of antipathy. Specific school regulations need to be examined in light of some purpose other than a very general "quality education." For example the purpose of a teacher certification requirement needs to be evaluated in terms of what a certificated teacher brings to the educative function that cannot be accomplished by any other alternatives. If legislatures and regulatory agencies will not function at a specific purpose level in designing laws and regulations then it may well be that future courts may do what the *Lee* Court suggested could be done but was reluctant to do, namely evaluate specific regulations in terms of their ability to accomplish a specific purpose.

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[45] For a discussion of burden of proof in religious cases *see* the article, *supra*, note 3.

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Reduction in Force: A Legal Update

Joesph C. Beckham

Dr. Beckham is an attorney and member of the faculty of the Florida State University's College of Education. A graduate of the University of Florida's Holland Law Center, he has served for over ten years as a consultant and legal counselor on matters of law and education to school districts, institutions of higher education, state departments of education and various national organizations. Beckham is a senior research associate with Florida State University's Institute for the Study of Higher Education and law editor of the *Journal of Education Finance*. His legal research studies have been published in law reviews and numerous professional education journals, including the *Journal of Education Finance* and the *Journal of Law and Education*.

When a reduction-in-force (RIF) decision is subject to legal challenge, the school board can normally expect to present evidence that a reduction was necessary and that fair and reasonable standards were applied in the determination of the position to be eliminated and the selection of the employee to be laid off. While courts grant considerable discretion to the local board in matters involving RIF, judicial review of the adverse employment decision is likely when there is evidence to sustain any one of three principal allegations:[1]

1. The school board has acted arbitrarily or capriciously.
2. The school board has failed to comply with procedural mandates required under provisions of state statute law, negotiated agreement or board policy.
3. The school board has utilized reduction in force in bad faith as a subterfuge for the denial of the employee's statutory or constitutional rights.

In challenging the RIF decision, the affected employee must bear the burden of proof in establishing that any one or all of the preceding allegations is justified by the evidence. The school board enjoys a presumption that it has acted in good faith for proper motives. A laid-off employee must overcome this presumption by presenting evidence to sustain the allegation. However, while indulging a presumption in favor of the school board, the court will review the administrative record related to the reduction in force with considerable care.

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[1] *See generally*, R. Phay, Reduction in Force: Legal Issues and Recommended Policy (NOLPE Monograph 1980), and Zirkel & Bargerstock, The Law on Reduction-In-Force: A Summary of Legislation and Litigation (ERS 1980).

ALLEGATIONS OF ARBITRARY OR CAPRICIOUS ACTION

Necessity for RIF

The school employee who is laid off may challenge the school board's RIF determination. Courts will usually demand that the school board substantiate the circumstances for a reduction in force, often requiring that the board present evidence of enrollment decline or financial exigency to justify necessity.[2]

The Supreme Judicial Court of Maine grants substantial discretion to local school boards in determining when changes in local conditions "warrant the elimination of the teaching position."[3] When a school board voted to limit its budget for the academic year so that local tax effort would not be increased by more than two mills, two teaching positions had to be eliminated. The state's high court held that a school board decision to save money and conserve scarce educational resources by eliminating teaching positions did constitute a change warranting RIF and only the board's exercise of that authority in bad faith for reasons unrelated to the best interests of education in the district would justify reversing the board's determination.[4]

Under Illinois law, a projected budget deficit for the upcoming school year would appear insufficient evidence to justify employee layoffs. School principals subject to a four-week layoff by the Chicago Board of Education contended that the board's action was arbitrary and capricious in violating employment contracts adopting the position of principal as a twelve-month position and in singling out the principals for a twenty-day layoff when other employees did not receive similar reductions. Evidence that there was a shortage of funds and thus a fiscal need to economize by laying off the principals was offered by the board in the form of the annual budget estimates. An Illinois

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2. *See, e.g.*, Bednar v. Butler Area School Dist., 410 A.2d 922 (Pa. Commw. Ct. 1980); Platko v. Laurel Highlands School Dist., 410 A.2d 960 (Pa. Commw. Ct. 1980) (suspension of school personnel sustained on basis of evidence of substantial decrease in pupil enrollment); and Fairview School Dist. v. Fairview Educ. Ass'n, 368 A.2d 842 (Pa. Commw. Ct. 1977) (remand for determination of whether district school actually suffered "substantial" enrollment decline).

3. 20 ME. REV. STAT. § 161.5 (1965).

4. Paradis v. School Admin. Dist., 446 A.2d 46 (Me. 1982).

appellate court held the employee's complaint sufficient to state a cause of action and remanded to determine as a factual matter whether the board's layoff plan was necessitated by the financial status of the district.[5]

Evidence that a guidance counselor's suspension was based upon loss of federal funding for the program which employed him has been held sufficient under Pennsylvania statutes governing reduction in force.[6] Similarly, a reduction in a Connecticut school board's budget request, imposed by the taxing authority, justified the elimination of positions and layoff of school employees.[7] However, tenured employee layoffs unrelated to enrollment declines or financial exigency within a district would be suspect under Pennsylvania law unless the layoffs are tied to state mandated program change.[8]

The bona fide elimination of a position may be sufficient cause for termination of an employment contract. In a Kansas case, the school board discontinued a cooperative special education program and formed a new interlocal cooperative to provide special education services. In holding that the dissolution of the old cooperative and formation of a new administrative entity to provide special education services constituted good cause for nonrenewal of a tenured teacher's contract, the Supreme Court of Kansas was unwilling to infer bad faith or arbitrary action on the part of the school district despite the dissenting opinion of one justice that the teacher appeared to have been singled out from among fifteen teachers for nonrenewal.[9]

California law permits the layoff of tenured professional employees when "a particular kind of service is to be reduced or discontinued,"[10] however, some ambiguity surrounds the meaning of "particular kind of service." In interpreting the meaning of the statutory language, California courts considered a case in which the local board sought to eliminate eleven (kindergarten through sixth grade) classes to effectuate reduction in program. The teachers who were riffed argued that no service could be reduced which was not capable of elimination under state law. A California appellate court held otherwise, granting school boards the discretion to reduce services in state mandated programs provided that the reductions did not result in the *elimination* of services required under California law.[11]

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[5] Perlin v. Board of Educ. of Chicago, 86 Ill. App. 3d 108, 407 N.E.2d 792 (Ill. App. Ct. 1980).

[6] Cadonic v. Northern Area Special Purpose Schools, 426 A.2d 186 (Pa. Commw. Ct. 1981).

[7] Baston v. Ricci, 174 Conn. 522, 391 A.2d 161 (Conn. 1978).

[8] *See* Eastern York School Dist. v. Long, 430 A.2d 267 (Pa. 1981); Warwick Bd. of School Dirs. v. Theros, 430 A.2d 268 (Pa. 1981); and Cumerland-Perry Area Voc.-Tech. School v. Brinser, 430 A.2d 276 (Pa. 1981) (equally divided Pennsylvania Supreme Court affirmed reinstatement of employees laid off due to program changes arguably based upon economic measures anticipated by school board budget deficits).

[9] Sells v. Unified School Dist. No. 429, 644 P.2d 379 (Kan. 1982). *See also* NEA-Valley Center v. Unified School Dist. No. 262, 644 P.2d 381 (Kan. 1982).

[10] CAL. EDUC. CODE § 44955 (West 19____).

Determination of Position and Employee

Even if the school board can establish the necessity for a RIF decision, it is likely to be challenged in the exercise of its discretion to determine the position to be eliminated and the employee to be affected. Courts have generally granted broad latitude to school boards in the determination of those positions which are expendable, but apply some oversight to board decisions on the selection of a particular employee in order to insure compliance with state statutory standards and bargaining agreements.

A Washington school district's elimination of the vice principal position in elementary schools and addition of head teacher positions in those schools was challenged as arbitrary and capricious. The Washington Supreme Court approved the consolidation of roles and the reassignment of duties from vice principals to head teachers as within the wide discretion of the school board where the necessity for budget cuts was uncontested.[12] In a similar case, the Minnesota Supreme Court has held that local school boards have the discretion to designate what positions will be eliminated and to determine whether or not an employee is within that position category.[13]

As a result of both a reduction and discontinuance of services, a California school district gave notice that the services of selected permanent teachers would not be required in the district during the ensuing school year. The teacher union argued that the district had the burden in layoff proceedings to establish a need to retain junior administrators in preference to a senior union employee with an administrative credential. The court held otherwise, recognizing that the school district must have the discretion to select its administrative personnel in order to meet specific board needs and ruling that no classroom teacher could obtain an administrative position solely because the administrator's position on a teacher seniority list was junior to that of the teacher.[14]

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[11] California Teachers' Ass'n v. Board of Trustees of Goleta Union School Dist., 132 Cal. App. 3d 32, 182 Cal. Rptr. 754 (Cal. Ct. App. 1982).

[12] Williams v. Seattle School Dist., 97 Wash. 2d 215, 643 P.2d 426 (1982).

[13] Foesch v. Independent School Dist., 300 Minn. 478, 223 N.W.2d 371 (1974).

[14] Palos Verdes Faculty Ass'n v. Governing Bd., ____ Cal. App. 3d ____, 183 Cal. Rptr. 196 (Cal. Ct. App. 1982).

In the absence of statutory or contractual restrictions, a school board decision determining which school employee is to be affected by reduction in force is subject to limited judicial review. The Nebraska Supreme Court has held that a school board may consider noneducational factors such as contribution to school activity programs as well as educational factors in selection of a teacher to be riffed.[15] RIF criteria approved by a Minnesota court included such factors as qualifications, salaries, financial status, certification, longevity, competency, recommendations of administrative staff, priority of programs and educational background or degrees.[16]

Strict seniority relative to reductions in force need not be required unless mandated by statute or contract agreement. While preference must be given to tenured or continuing contract employees relative to probationary or nontenured employees, the school board may consider any reasonable criteria in making a selection. A former principal demoted and reassigned as a fifth grade teacher when reorganization and closing of schools was compelled, challenged a Pennsylvania school board's use of a rating form as a factor in his reassignment. The use of the rating, together with considerations related to administrative continuity of programs within schools, was upheld as a permissible exercise of school board discretion.[17] However, a school board in South Dakota was held to have abused its discretion when the board violated its own policy in carrying out staff reductions. The board's policy gave priority to renewing teachers under continuing contract over those not under continuing contract, subject to an exception in which an individual staff member is needed to maintain an existing program. A teacher with eleven years of service in the system was terminated due to a need to reduce staff, but a teacher with less seniority was retained and assigned to part of the math program the former teacher instructed. The Supreme Court of South Dakota affirmed a lower court decision holding that the board had failed to establish an exception to its seniority rule that was based on competent, credible evidence.[18]

Frequently, a collective bargaining agreement may influence layoff decisions. In Iowa, a teacher complained of improprieties in the board's use of a formula giving weight to both training and experience in making layoff decisions. The negotiated agreement specified that such decisions would be made on the basis of qualifications. The appellate court found the board met the conditions of the agreement, harmonizing experience and training as factors the board could reasonably include in the concept of qualifications.[19]

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[15] Dykeman v. Board of Educ., ___ Neb. ___, 316 N.W.2d 69 (1982).

[16] Jordahl v. Independent School Dist. No. 129, 225 N.W.2d 224 (Minn. 1974).

[17] Brown v. School Dist. of Cheltenham Twp., 417 A.2d 1337 (Pa. Commw. Ct. 1980).

[18] Schnabel v. Alcester School Dist., 295 N.W.2d 340 (S.D. 1980).

The interpretation of seniority provisions involving reductions in staff can be complicated by state law as well as by board policy and practice. Pennsylvania law required reductions in force to be based on seniority except where performance ratings indicated substantial differences between employees. A necessary reduction in the physical education department was predicated on balance between male and female staff and seniority. The suspension of a male instructor with the least seniority was challenged. The court held the selection of a male was rationally based on the valid and practical need for balance among the sexes in a high school physical education program. In upholding the use of seniroity as the sole criterion, the court noted that no substantial differences existed in previous yearly ratings, thus the fact that a rating had not been undertaken in the current school year was disregarded.[20]

PROCEDURAL FAIRNESS

Under the fourteenth amendment,[21] the school employee's interest in public employment may be protected through provision of due process. Since employee layoffs are not conditioned upon performance, no liberty interest would appear to be involved in a reduction in force. Teachers with continuing contract, or some form of statutory or implied tenure, could argue their right to constitutional due process based on a property right to their jobs, however, procedural protections in RIF decisions have largely focused on interpretation of state mandates rather than federal constitutional standards.

Procedural fairness in a reduction in force will vary with the interpretation of state statutory mandates, terms of the negotiated agreement between the board and employee union and school board policy. Under Massachusetts standards, a dismissal law applicable to tenured teachers was not applicable in the case of termination due to declining enrollment. As a consequence, no constitutionally protected right to continued employment existed that would require a hearing.[22] Alternatively, where the basis for eliminating a position is couched in terms of a "program reorganization" without further specificity, Rhode Island and Florida court decisions have granted the right to notice of nonrenewal and a hearing if demanded.[23]

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[19] Von Krog v. Board of Educ. of Beaman-Conrad-Liscomb, 298 N.W.2d 339 (Iowa Ct. App. 1980).

[20] Fatscher v. Board of School Dirs. of Springfield, 417 A.2d 287 (Pa. Commw. Ct. 1980). *See generally* Gabriel v. Trinity Area School Dist., 350 A.2d 203 (Pa. Commw. Ct. 1975), and Board of Dirs. of Riverside School Dist. v. Carmody, 408 A.2d 885 (Pa. Commw. Ct. 1979) (the delineation of what constitutes "substantial difference" in performance ratings utilized in employee layoffs).

[21] U.S. CONST. amend. XIV § 1.

[22] Milne v. School Comm. of Manchester, 410 N.E.2d 1216 (Mass. 1980).

Ohio statutory procedure for suspending teachers for reasons of decreased enrollment requires no hearing.[24] Whereas statutory procedure in California elaborates a detailed set of requirements where the layoff of certified employees is proposed by the school district. A part of that procedure requires notice on or before March 15 to the employees proposed to be laid off. Provisions exist for a hearing with a final notice of layoff to be sent on or before May 15. The California Court of Appeal held that in determining the number of employees who could be laid off, resignations, retirements, or attrition for other causes effective the following school year must be taken into account.[25]

In Pennsylvania, when a position is abolished, notice and a hearing is required for the accompanying demotion or suspension of the employee. A representative Pennsylvania case involved an employee who was demoted to the position of classroom teacher when his position as Director of Elementary Education was abolished. Petitioner argued that his demotion was improper because notice was insufficient, the hearing was not timely held, and it was not a fair hearing consistent with due process. The commonwealth court held the board's action in returning petitioner to a teaching position was a demotion and required a hearing, but the demotion was accompanied by sufficient and timely notice and a hearing at which the school district established that the petitioner's position was abolished as part of a general reorganization to ensure effective management and reduce costs. Finding that the petitioner made no allegations that the board's action was a sham to demote petitioner without cause, the court affirmed the demotion.[26]

Following adoption of a budget incorporating statutorily compelled reductions in district operating expenses, the school district of Philadelphia gave demotion notices to approximately 240 professional employees. The board conducted one mass hearing for all demoted employees and presented testimony establishing the budgetary necessity of the budget reductions. Requests for individual hearings were denied by the board as were requests of counsel relating to the rights of individual employees. However, the board indicated its willingness to hold future individual hearings for the purpose of establishing that its action was neither arbitrary nor discriminatory.

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[23] *See* Providence Teacher's Union v. Donilon, 492 F. Supp. 709 (D.R.I. 1980) (where notice that nonrenewal was based on program reorganization was held to be inadequate), and Freeman v. School Bd. of Broward Cty., 382 So. 2d 140 (Fla. Dist. Ct. App. 1980) (where a supervisor of a handicapped physical education program was held to have a statutory right to a judicial hearing concerning the school board's decision to eliminate his position in a program reorganization).

[24] Dorian v. Euclid Bd. of Educ., 404 N.E.2d 155 (Ohio 1980).

[25] Moreland Teachers Ass'n v. Kurze, 109 Cal. App. 3d 648, 167 Cal. Rptr. 343 (1980).

[26] Nagy v. Belle Vernon Area School Dist., 412 A.2d 172 (Pa. Commw. Ct. 1980).

The Supreme Court of Pennsylvania adopted a construction of the due process requirements of Pennsylvania statute law which permitted the demotions without prior individualized hearings under the procedure for post-demotion hearings proffered by the board. Taking judicial notice of the extraordinary budget crisis involved, the court harmonized the mandatory hearing requirements of state statute law with the legislative intention that the board discharge its responsibility to administer an efficient school system. Full pre-demotion hearings were considered to unnecessarily and unwarrantedly circumscribe the board's discretion in its good faith effort to discharge its responsibilities. Since all professional employees could be fully protected by the post-demotion hearing proposed, the court reinstated the procedure adopted by the board.[27]

Under South Dakota statute law, a continuing contract teacher dismissed for cause would be granted a right to notice and hearing. In constructing its RIF policy, a school board incorporated the due process elements of the statute but failed to grant hearings to dismissed teachers on the grounds that the statutory right to a hearing was inapplicable when discharge was solely for economic reasons. The Supreme Court of South Dakota rejected this argument, holding that once the board adopted a policy granting hearings on staff reductions of continuing contract teachers, the board must follow the policy.[28]

North Dakota statute providing that school boards give maximum consideration to fairness and decency in reducing staff was interpreted to require notice of the reasons for a reduction in force, but did not mandate that school boards articulate reasons for the selection of one teacher over another. While a hearing could be compelled by a laid off teacher, the hearing would be solely for the purpose of confirming the reasons for lay off, not to discuss selection procedures used by the board in making the lay off decision.[29]

While state due process standards vary, two legal generalizations seem warranted with regard to reduction in force. First, when a school board invokes procedures for reduction in force it must comply with state statutes, contractual obligations and board policies unless both employee and board agree to procedural modifications.[30] Second, while

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27. School Dist. of Philadelphia v. Twer, 447 A.2d 222 (Pa. 1982).
28. Ward v. Viborg School Dist., 319 N.W.2d 502 (S.D. 1982).
29. Reed v. Edgeley Public School Dist. No. 3, ____ Neb. ____, 313 N.W.2d 775 (1981).
30. *See* Board of Educ. v. Hunley, 288 S.E.2d 524 (W. Va. 1982).

substantial conformance to state due process standards should be maintained, the rigorous notice and hearing requirements associated with dismissal for cause do not apply in reduction in force cases.[31]

BAD FAITH

The employee who is affected by a reduction in force may challenge the decision on one of several grounds related to a charge that the RIF is a subterfuge for impermissible discharge. If the school employee can establish that the adverse employment decision is substantially motivated by or predicated on an attempt to subvert tenure or continuing contract rights, punish the employee for the exercise of constitutionally protected rights or invidiously discriminate against the employee, the reviewing court will overturn the board's action. In cases of this type, the employee seeks to invalidate the RIF decision on the basis that the school board has acted in bad faith.

Subversion of Tenure Rights

In one category of cases involving bad faith, the employee alleges that the board's decision is actually an attempt to circumvent the "good cause" requirement for discharge under statutory entitlements to tenure or continuing contract. The layoff of a tenured teacher under a reduction in force would not normally require the board to give rigorous attention to procedural due process and to establish substantial evidence for dismissal based on the employee's conduct. As a consequence, the board's elimination of a position and termination of an employee might more readily be accomplished under a reduction in force than in a discharge for cause action. In cases of this kind, the court may be disposed to carefully examine the board's action, giving attention to the circumstances which appear to have influenced the board's decision to abolish a position.[32]

Typical of this type of case is a Pennsylvania decision in which an administrator appealed from the decision of the school board abolishing his position and reassigning him to the position of classroom teacher. After a hearing, a majority of the board concluded that the position had been abolished for budgetary and economic reasons. However, the board's special counsel for the proceeding recommended that the board rescind its action eliminating the position and reinstate the administrator on the ground that the evidence demonstrated the board's action was not based on financial considerations. The administrator argued that the elimination of the position and his concurrent reassignment were unrelated to the budgetary considerations but were in response to public pressure. The court held that the board's decision was based on reasons other than stated economic and financial considerations. The board's action was nullified, and the administrator ordered reinstated to his former position with back pay.[33]

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[31] *See* Candelori v. Board of Educ. of New Britain, 180 Conn. 66, 428 A.2d 331 (1980).

[32] *See* Currier v. Tompkins-Tioga Bd. of Coop. Educ. Services, 80 A.2d 979, 438 N.Y.S.2d 605 (N.Y. App. Div. 1981).

Courts view with particular scrutiny those cases in which a position is abolished and the duties of the position are then assigned to a new employee under the guise of a change in title. While it is recognized that elimination of a position will sometimes require the transfer of functions to other positions, courts seek to uphold the protections granted to tenured employees under state statute law.

A full-time tenured teacher was discharged as a result of faculty reductions in the school district. She challenged the board's refusal to reinstate her to a teaching position in English as arbitrary and capricious. Subsequent to notice of discharge, the board hired another teacher with less seniority to fill a position in English. Although the tenured teacher made a demand for reinstatement to teach courses in English or European history, both of which she was qualified to teach under state law, the board denied her request. The board refused reinstatement on the basis that the positions available involved at least one course for which the teacher was unqualified.

While a school board has broad authority to create teaching positions and arrange teaching assignments, realignments which are designed to avoid the existence of a position which could be filled by an honorably discharged tenured teacher may be deemed arbitrary and capricious. The board refused reinstatement because the teacher was not qualified to teach one course in journalism required by the redefined position. However, another faculty member, whose teaching position was exclusively comprised of English courses, was competent to teach journalism. The court regarded the simple transposition of one class in English for one class in journalism as sufficient to continue the discharged faculty member's employment, and prohibited the district from implementing the realignment when it appeared clear that the courses could easily have been interchanged among existing faculty without jeopardizing any tenured teacher's rights.[34]

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[33] Genco v. Bristol Borough School Dist., 423 A.2d 36 (Pa. Commw. Ct. 1980).

[34] Peters v. Board of Educ. of Rantoul Twp., ____ Ill. App. 3d ____, 435 N.E.2d 814 (Ill. Ct. App. 1982).

Substantive Constitutional Rights

While no constitutional right is absolute, it is generally recognized that a public school board cannot punish an employee for that employee's exercise of a constitutionally protected right.[35] This legal proposition means that the board will be prohibited from using reduction in force as a guise for seeking retribution against an employee's constitutionally protected conduct.[36] While the burden of proof is on the laid-off employee to prove the board acted in bad faith, courts generally permit greater latitude to an employer alleging denial of substantial constitutional rights, frequently allowing jury determination of the question of bad faith.[37]

A teacher who wrote two letters to the local newspaper criticizing the school board's stress on athletic programs alleged that her layoff, ostensibly due to declining enrollments, was retaliation for her exercise of free speech. The board's plan for selection of the teacher to be laid off weighted heavily on subjective evaluations by administrators and the school board. A jury determination that the teacher's selection for lay off was substantially based on her public criticism of the board was affirmed by the Eighth Circuit Court of Appeals.[38]

Discriminatory Practice

Another area in which courts closely examine allegations of bad faith involves charges of discrimination in violation of equal protection of the laws[39] or the provisions of Title VII of the Civil Rights Act of 1964.[40] While courts have utilized equal protection standards in cases involving the unification of school districts under court orders to desegregate,[41] most cases alleging discrimination on the basis of sex or race are brought under Title VII.

Representative of the discrimination cases now receiving scrutiny in federal courts is a suit involving transfer of a junior high school art teacher to an elementary school in the system. The teacher who had twenty years' experience as a junior high school art teacher and who had received both master's and doctoral degrees in art education focused on the middle school, was transferred due to declining enrollments. She contended that a male art teacher with less seniority and experience was better suited to the reassignment. The Second Circuit Court of Appeals held that the transfer constituted interference with a condition of employment that adversely affected her status within the meaning of Title VII. As to a showing that the district's actions were mere pretexts for sex discrimination, the teacher alleged that in twenty-two years there had never been a male art teacher in the system's elementary schools, and, further, her supervising principal allegedly said that the district would never allow a male to teach elementary school art. These allegations, in the opinion of the court, were sufficient to present a triable issue of fact, thus requiring a reversal of the district court's dismissal for failure to state a claim. The Second Circuit decision emphasized that sex stereotyping by segregating female teachers in elementary schools would not be tolerated under the provisions of Title VII.[42]

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[35] *See generally* Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); and Pickering v. Board of Educ., 391 U.S. 563 (1968).

[36] *See* Collins v. Wolfson, 498 F.2d 1110 (5th Cir. 1974).

[37] *See* Unified School Dist. No. 480 v. Epperson, 583 F.2d 1118 (10th Cir. 1978).

[38] Zoll v. Eastern Alamakee Commun. School Dist., 588 F.2d 246 (8th Cir. 1978).

[39] U.S. CONST. amend. XIV. *See generally* 42 U.S.C. § 1983 (1976) which provides a private cause of action for redress of a deprivation of a constitutionally protected right.

[40] 42 U.S.C. § 2000e (1976).

[41] *See* Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1970), *cert. denied*, 390 U.S. 1032 (1970). *See generally* J. BECKHAM, LEGAL ASPECTS OF TEACHER EVALUATION 12-32 (NOLPE Monograph 1981).

In a case which focuses on a school board's previous bad faith relative to racially discriminatory hiring practices, the Boston School Committee was under a court order to desegregate but was experiencing a financial crisis. Layoffs were compelled, but the school committee faced conflicting obligations: layoffs based on collective bargaining agreements emphasized seniority, which if followed would violate court-ordered desegregation orders to maintain the then current percentage of black faculty and staff. The school committee decided to conduct layoffs so as to maintain the percentage of black faculty, and was ordered by the federal court to conduct administrative layoffs on the same basis.

The teachers' union challenged the layoff policy, arguing that since the initial desegregation objective had been accomplished the federal courts had no jurisdiction to interfere and asserting that the preference in layoffs for black faculty constituted a forbidden racial preference. The First Circuit Court of Appeals gave strict scrutiny to the lay-off policy favoring recently hired black teachers and administrators and found that a compelling need for remediation to end a previous history of racial discrimination justified the policy. The policy was held to be reasonably necessary to safeguard the achievement of desegregation realized in the preceding seven-year period. Finally the court continued to exercise jurisdiction over desegregation policies of the school district, but noted that this was not a case in which a judicial formula had been imposed upon a resistant school board, rather, the court had substantially affirmed the policy on layoffs which the school committee had adopted. The court was not intrusive in the affairs of the local board largely because the board's interest in remedying constitutional violations was consistent with past court orders and adopted board policies to cure the effects of a formerly segregated system.[43]

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[42] Rodriguez v. Board of Educ. of Eastchester, 620 F.2d 362 (2d Cir. 1980).

The Ninth Circuit Court of Appeals overruled a federal district court's determination granting summary judgment in favor of a school district where the appellate court concluded that a genuine issue of fact existed as to whether a female school principal's reassignment and subsequent discharge were the result of sex discrimination by the superintendent. The appellate court reviewed a record in which the superintendent's "attitudinal disposition" suggested difficulty in relating to women administrators and particular problems in working with the woman principal in the case. This evidence of a general disposition suggestive of sexism and animosity toward the principal might lead a jury to conclude that the real reason for reassignment and discharge was prejudice against women rather than financial exigency.

EMPLOYEE'S PRE- AND POST-TERMINATION RIGHTS

State statutes, board policies, or collective bargaining agreements often provide pre- and post-termination protections for the employee whose position is eliminated in a reduction in force. When a tenured employee's position is to be eliminated, that employee may request transfer to a currently unfilled position or to a position held by an untenured teacher. If the tenured employee is qualified and certified for the position, the school board may be legally obligated to place the employee in the "available" position before lay-off based on RIF. When the senior or tenured employee replaces a less senior employee, the procedure is referred to as "bumping."

Even if no available position exists for which the employee can qualify at the time of layoff, many school boards are under a duty to give preference to employees released due to a reduction in force when later vacancies occur. This latter duty focuses on the board's obligation to provide preferred eligibility status to laid-off employees under "call-back rights."

Bumping

When a senior or tenured teacher seeks another teacher's position, courts are frequently asked to assess whether the local school board has properly determined the qualifications for the position sought. A tenured teacher in Illinois sought to bump a nontenured teacher whose position involved instruction in an open, "noncontained" classroom. The school board's position, denying the tenured teacher's request on the ground that the teacher lacked the training and experience necessary for teaching in an open classroom, was upheld by the Illinois Appellate Court.[45] In New York, "lack of similarity" between the positions of junior high school principal and senior high school assistant principal was accepted by an appellate court as a satisfactory rationale for upholding a school board's decision denying a school administrator's application for a position following reduction in force.[46]

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[43] Morgan v. O'Bryan, 671 F.2d 23 (1st Cir. 1982). *See also* Oliver v. Kalamazoo Bd. of Educ., 498 F. Supp. 732 (W.D. Mich. 1980).

[44] Padway v. Palches, 665 F.2d 965 (9th Cir. 1982). *See also* Gillespie v. Board of Educ. of North Little Rock, 528 F. Supp. 433 (E.D. Ark. 1981).

Board decisions regarding qualifications are not always affirmed by courts. In a New York case, a board appealed a lower court decision that compelled the board to place a tenured teacher in a tenure area in which he had previously served under license. The teacher, who was laid off from a tenured position as a homebound teacher, sought to be hired as a science teacher in the day school. The appellate court held that a tenured teacher, who is laid off from his tenured position, may revert to his former license area, inasmuch as he had greater seniority based on length of service and could displace a teacher tenured in the area who had less service.[47]

A tenured teacher, who was certified as a public health nurse, had been in a Minnesota school system for over fifteen years and was put on involuntary leave of absence for financial reasons. Noncertified school nurses with less tenure and lower salaries were retained. Although the district court upheld the board's action, the supreme court found the public health nurse entitled to the same rights as a teacher and held that the "position" involved had not been termined. The negotiated agreement specified that "teachers shall be placed on unrequested leave in inverse order of seniority in the field and subject matters in which they are employed." The decision of the court was that the nurse be reinstated.[48]

A provocative dicta with implications for bumping rights was offered by an Illinois appellate court in the course of denying a teacher's request for injunctive relief. The teacher was bumped in accordance with terms of a collective bargaining agreement when another more senior teacher's position was eliminated and the senior teacher chose the particular teacher's assignment. The teacher suffered no salary loss or loss of seniority rights in a reassignment to another school ten miles more distant from her home, thus the absence of irreparable harm led to denial of injunctive relief. However, the court observed that the bargaining agreement gave senior teachers the right to choose their particular assignments upon the elimination of their positions and noted that such a contract provision might unlawfully restrict the school board's statutory authority to transfer teachers.[49]

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[45] Lenard v. Board of Educ., 57 Ill. App. 3d 853, 373 N.E.2d 477 (1978), *aff'd*, 74 Ill. 2d 260, 384 N.E.2d 1321 (1979). *See also* Herbach v. Board of Educ., 94 Ill. App. 3d 889, 419 N.E.2d 456 (1981).

[46] Kelley v. Ambach, 83 A.D.2d 733, 442 N.Y.S.2d 616 (N.Y. App. Div. 1981). *See also* Newman v. Board of Educ., 98 Ill. App. 3d 976, 424 N.E.2d 1331 (1981).

[47] Dinerstein v. Board of Educ., 50 N.Y.2d 879, 430 N.Y.S.2d 262 (N.Y. Ct. App. 1980).

[48] Krug v. Independent School Dist. No. 16, 293 N.W.2d 26 (Minn. 1980).

While no clear cut legal standard emerges from decisions regarding school board procedures relative to employee bumping, a balancing test, giving deference to school board discretion while offering some protection to the tenured employee, seems to prevail. The school board must offer some reasonable basis for its decision to allow or disallow bumping, and the reviewing court will scrutinze the board's rationale to insure conformance with the terms of state law, board procedure and contract obligation. If the board decision can reasonably be said to conform to applicable legal standards, then the employee may be compelled to prove bad faith in order to overcome a legal presumption favoring the board.

The application of a standard of reasonableness can best be illustrated in cases involving the realignment of employees to accommodate a tenured or senior teacher displaced by reduction in force. For example, while bumping requirements might require a board to make room for a senior displaced teacher if essentially identical programs are involved, Oregon statutes have not been interpreted to require a district to shuffle teachers to create a vacancy which a displaced teacher could only fill after further upgrading of qualifications.[50] Pennsylvania has recognized that any reasonable realignment of teachers to create a vacancy for a displaced tenured teacher is required, but a school district need not shuffle teaching positions where there is substantial evidence to support a board's finding that the realignment would be impractical.[51]

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[49] Wilfong v. Collinsville Commun. U.S.D., 63 Ill. Dec. 487, 438 N.E.2d 225 (Ill. Ct. App. 1982).

[50] Shandy v. Portland School Dist. No. 1, ____ Or. App. ____, 634 P.2d 1377 (Or. Ct. App. 1981).

[51] Proch v. New Castle Area School Dist., 430 A.2d 1034 (Pa. Commw. Ct. 1981), and Platko v. Laurel Highlands School Dist., 410 A.2d 960 (Pa. Commw. Ct. 1980). *But see* Hession v. Board of Educ., ____ Misc. 2d ____, 443 N.Y.S.2d 1010 (N.Y. Sup. Ct. 1981) (where fact that removal of least senior teacher could result in major administrative problems would not justify failure of district to comply with statute law regarding abolition of position).

Call-Back Rights

After lay-off, the former employee may request placement on a preferred list for new hiring in the event a position becomes available for which the former employee is qualified. As with cases involving bumping, a question often arises as to whether the former employee is appropriately certified or qualified for the position. A New York statute provided for reappointment of teachers from a preferred eligibility list to vacancies in corresponding or similar positions in order of the teacher's length of service. In construing the provision, the appellate court gave broad meaning to the term "similar," but declined to award a position to a teacher who had more system seniority. In dismissing the appeal, the court concluded that a vacancy as a junior high social studies teacher was more appropriately given to a teacher who had taught junior high social studies for five years and high school English for one year than to a teacher with three years of elementary school teaching, three years of remedial reading teaching in a junior high, and one year in business education.[52]

Seniority alone does not create an absolute right of recall and/or first refusal in a teacher who has been laid off due to declining enrollments. In Minnesota, the local board must give consideration to seniority under Minnesota statute law, but may exercise discretion in awarding positions where the district can show that the terminated senior teacher was given consideration and that a demonstrable reason based on a comparison of qualifications among applicants led to the selection of a less senior but more qualified applicant. In the latter case, a senior teacher was given recall consideration for a position that involved working with disadvantaged students, but denied recall in favor of teachers who had direct experience and training in working with the special federal program for the disadvantaged.[53]

In an action requesting mandamus to compel rehiring, a California appeals court required reconsideration of a board's employment decision when a laid off teacher's preferential reemployment rights were violated. The appellate court found that the board's decision not to hire the more senior teacher was predicated on insufficient teaching experience at the middle school level and on insufficient academic preparation in physical science. While the latter consideration was a permissible qualification for the exercise of board discretion in rehiring, the imposition of prior teaching experience at the middle school level was not previously a prerequisite for hiring at the middle school level, violating a California recall provision which stipulated that the board could impose no requirement which was not imposed upon other employees who were continued in service.[54]

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[52] Dinan v. Board of Educ., 74 A.D.2d 922, 426 N.Y.S.2d 86 (N.Y. App. Div. 1980).
[53] Berland v. Special School Dist. No. 1, 314 N.W.2d 809 (Minn. 1981).

While the court's decision would appear to limit board discretion in determining teacher competence relative to recall, it is important to note that the court's decision did not grant mandamus to compel rehiring. Rather, the court recognized the board's authority to consider the senior teacher's academic background as a qualification for the teaching position and required the board to reconvene and reconsider the senior teacher's application for rehiring.

The purpose for creating a preferred eligibility list for former employees whose positions have been abolished is to provide mandatory preference in rehiring when a position becomes available. Whether a true "vacancy" within the meaning of a call-back provision occurs is often at issue. When a teaching position becomes temporarily open due to an employee's short-term leave of absence, it has been held that no vacancy exists that would require the appointment of an eligible former employee.[55]

Board policies prevailed in a tenured teacher's appeal from a dismissal of her petition for reinstatement in New York. The teacher argued that the board made a temporary appointment to fill a permanent vacancy by hiring her as a substitute for a period of eleven days prior to reinstatement as a regular teacher. It was held that a board has power to determine when a vacancy exists and, therefore, a tenured teacher, who was excused, resumed work as a substitute, and was then reinstated as a regular teacher, was not entitled to back pay and accrued seniority from the time the vacancy arose until the time she resumed work as a substitute.[56]

Under Minnesota statute law, a formerly full-time teacher is not considered fully reinstated upon being given a part-time position. After being placed on unrequested leave of absence, the male physical education teacher accepted a part-time position in the district. When a part-time position instructing girl's physical education became available, the school district denied the position to the part-time male teacher who possessed appropriate certification and seniority. The Supreme Court of Minnesota ruled that the legislature's intended meaning of "reinstate" meant that a school district must make positions comparable in size to the positions lost available to teachers on unrequested leaves of absence due to reductions-in-force.[57]

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[54] Martin v. Kentfield School Dist., ____ Cal. App. 3d ____, 184 Cal. Rptr. 566 (Cal. Ct App. 1982).

[55] Brewer v. Board of Educ. of Plainview-Old Bethpage, 51 N.Y.2d 855, 433 N.Y.S.2d 1009 (N.Y. 1980).

[56] Tremblay v. Board of Educ., 75 A.D.2d 621, 427 N.Y.S.2d 51 (N.Y. App. Div. 1980).

Courts grant considerable discretion to school boards in the interpretation of call-back requirements, particularly where the former employee seeks realignment of positions in order to create vacancies. In the interpretation of recall provisions in a negotiated agreement, the Court of Appeals of Iowa was asked by a teacher suspended due to reduction in force to compel the board to shift teachers with whom she was compared into vacancies caused by attrition so that she might regain her position. The collective bargaining agreement contained a provision permitting a terminated teacher recall rights to any position available and for which the teacher was qualified. The court held that a school board is not obligated to make wholesale rearrangements of teacher assignments whenever a vacancy occurs in order to accommodate a former employee.[58] Similarly, where a board created two three-quarter time teaching positions and offered one to an eligible former employee, the employee could not claim bad faith in the board's decision not to consolidate the positions and to deny the eligible employee full-time status.[59]

CONCLUSION

Judges are reluctant to interfere in the decision-making process traditionally reserved to a local school board. However, reductions in force may implicate property rights based on state statutory or contractual obligations that warrant judicial review of administrative policies and board decisions. Where board decisions are arbitrary or capricious, lack supporting evidence or deny the individual's constitutional or statutory rights, judicial intervention can be anticipated.

The applicable legal standards governing reduction in force will vary with the legal interpretation to be given state statutes, board policies and bargaining agreements. However, when state law provides no definitive statement on the legal issue related to reduction in force, general principles of law requiring a reasonable basis for board action will be applied to allegations of bad faith or lack of procedural fairness in court review of the adverse employment decision.

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[57] Walter v. Independent School Dist., 323 N.W.2d 37 (Minn. 1982).

[58] Von Krog v. Board of Educ. of Beaman-Conrad-Liscomb, 298 N.W.2d 339 (Iowa Ct. App. 1980).

[59] Zurlo v. Ambach, 53 N.Y.2d 1035, 442 N.Y.S.2d 486 (N.Y. 1981).

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An Overview of the Law Regarding Search and Seizure in Public Schools

KELLEY BAKER

Kelley Baker is an attorney practicing school law with the firm of Nelson & Harding in Lincoln, Nebraska. He has acted as Legal Counsel for the Nebraska State School Boards Association and as visiting assistant professor at the University of Nebraska where he teaches education law. Mr. Baker has been Secretary of Nebraska School Boards Council of School Attorneys. He has been actively engaged in speaking, editing and writing for school law organizations. He received his J.D. from the University of Nebraska.

THE FOURTH AMENDMENT AND PROBABLE CAUSE

The underlying purpose of the fourth amendment is to protect one's privacy and security from "arbitrary invasions by government officials."[1] The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[2]

The fourth and other amendments in the Bill of Rights were originally intended to apply only to actions of the federal government. However, the United States Supreme Court has held the fourth amendment applicable to actions of the state through the fourteenth amendment.[3]

Translating the language and concepts of the fourth amendment into workable standards has proved a subject of great controversy in numerous court decisions. Generally, a search of private property is

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1. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).
2. U.S. CONST. amend. IV.
3. Ker v. State of California, 374 U.S. 23 (1963).

unreasonable unless it is authorized by a valid search warrant supported by probable cause. To determine whether probable cause exists, it is necessary to balance the "need to search against the invasion which the search entails."[4] To secure a warrant, one must describe the item(s) to be seized, the time of the search and the probable cause justifying the search.

The Supreme Court has established five exceptions to the rule necessitating a search warrant: when one has knowingly consented to the search,[5] when crime-related items are in plain view of the government official,[6] when circumstances would render the search useless if a warrant had to be obtained,[7] when the search is incident to a valid arrest[8] and as a part of a stop and frisk.[9] Violating the fourth amendment could subject a government official to civil and criminal redress. Finally, and of signal importance, evidence obtained through an illegal search may be held inadmissible at trial through the exclusionary rule.[10]

DEVELOPMENT OF THE LAW AS APPLIED TO SCHOOLS

Any notion that public school students were bereft of constitutional rights was dispelled by the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District.*[11] In *Tinker,* the Court held that students who wore black armbands to protest the Vietnam War were exercising their first amendment right of freedom of speech. The Court wrote:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[12]

The Court held that students are "persons" under the Constitution who possess fundamental rights which the state must respect.[13] A year earlier, the Court had held that the Bill of Rights applies to juveniles.[14]

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[4] Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

[5] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[6] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[7] Chambers v. Maroney, 399 U.S. 42 (1970).

[8] Chimel v. Louisiana, 395 U.S. 752 (1969).

[9] Terry v. Ohio, 392 U.S. 1 (1967).

[10] Mapp v. Ohio, 367 U.S. 643 (1961).

[11] 393 U.S. 503 (1969).

[12] *Id.* at 506.

[13] *Id.* at 512.

[14] *In re* Gault, 387 U.S. 1 (1968).

The question for courts and school administrators since *Tinker* has been to determine what rights students take beyond the schoolhouse gate and just how far they take them "in light of the special characteristics of the school environment. . . ." Though the Supreme Court held in 1973 that education was not a fundamental right under the Constitution,[15] it ruled two years later that students in the Columbus, Ohio public school system were entitled to due process prior to being suspended for misconduct.[16] In 1977, the Court decided that the eighth amendment prohibition against cruel and unusual punishment did not apply to students in public schools.[17]

Only One State Extends Full Fourth Amendment Rights to Students

Louisiana is the only state which has held that the fourth amendment requirement of probable cause applies to school searches.[18] *State v. Mora* invalidated the search by a physical education instructor who discovered marijuana among the student's personal belongings entrusted to his care during class. The court ruled that school officials are government agents who must be held to the same standards as police officers regarding search and seizure.[19]

Louisiana stands alone in its application of fourth amendment limitations to searches and seizures in the schools. The common characteristic of all other school search and seizure cases is a standard of less than probable cause, often expressed as "reasonable cause."

School Officials as Private Citizens

It is well established in court decisions that the fourth amendment governs the actions of state officials, not private citizens.[20] Several courts have upheld searches on the theory that school officials were acting as private citizens.[21] This theory has lost considerable force over the past decade as courts increasingly recognize the nature of school officials as representatives of the state.

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[15] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[16] Goss v. Lopez, 419 U.S. 565 (1975).

[17] Ingraham v. Wright, 430 U.S. 651 (1977).

[18] State v. Mora, 307 So. 2d 317 (La. 1975).

[19] The United States Supreme Court vacated the decision in *Mora* and remanded for a determination of whether the holding rested on federal or state law or both. 423 U.S. 809 (1975). On remand, the Louisiana high court determined that state law supported its determination that the school official was a government official, both state and federal law supported its determination that the search was unreasonable and federal law supported the exclusion of the illegally obtained evidence.

[20] Burdeau v. McDowell, 256 U.S. 465 (1921).

[21] *See, e.g.*, Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974); *In re* W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (Cal. Ct. App. 1973); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970).

The Doctrine of In Loco Parentis

The doctrine of *in loco parentis*, that a school official stands "in the place of the parent," has been widely adopted to justify school searches.[22] The doctrine is usually coupled with a requirement that reasonable cause be shown to support the search. *Overton*[23] was one of the bellwether cases regarding *in loco parentis* and school searches. In *Overton* a high school vice-principal approved the search of a student's locker by police officers who presented a search warrant which was later determined to be defective. The court upheld the search on the basis of the vice-principal's consent and wrote:

> The school authorities have an obligation to maintain discipline over the students. It is recognized that when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards. . . . It is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.[24]

In *Jackson*,[25] a high school coordinator of discipline received information which caused him to remove a student from class. As they walked toward the office, the coordinator noticed a large bulge in the student's left pant's pocket. He also noticed that the student continuously ran his hand in and out of his pocket. As they approached the office, the student bolted toward an exit. The coordinator called out to a police officer "he's got junk and he's escaping." The coordinator ran down the student three blocks from school, grabbed his left wrist and discovered a syringe, eyedropper and other drug paraphernalia. The court denied the motion to exclude the evidence at a criminal trial and noted:

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[22] *See, e.g.*, People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (N.Y. 1967); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (Wash. 1977); *In re* Ronald B., A.D.2d 204, 401 N.Y.S.2d 544 (N.Y. App. Div. 1978); Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (N.Y. App. Div. 1971).

[23] People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (N.Y. 1967).

[24] *Id.*

[25] People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (N.Y. App. Div. 1971).

> The *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including the search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable.[26]

The Reasonable Suspicion Standard

Many courts have adopted a reasonable suspicion standard, whether or not it is bottomed on *in loco parentis*.[27] The reasonable suspicion standard does not waive the requirement of some cause to search. Instead, it substitutes a less onerous standard than probable cause to justify searches in the "special characteristics" of the school context. Citing *Camara*, the Supreme Court of Georgia explained:

> As we have seen, the allowable scope of a search is not absolute, but varies with varying circumstances as we balance fundamentally competing interests. . . . There are governmental interests of discipline, security and enablement of the education function to be served by allowing searches of students by the officials charged with their education and control. Primarily, these searches are not undertaken in any law enforcement capacity but are designed to allow enforcement of multiple rules, regulations and prohibitions which are imposed to maintain an atmosphere of security and calm necessary to allow education to take place.[28]

In defining the term, the Washington Supreme Court concluded that "reasonable cause" and the fourth amendment were satisfied "if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order."[29] The court in *People v. Scott D.*[30] set out the criteria to consider in determining whether reasonable suspicion exists. They are: the child's age, history, record in school, the prevalence and seriousness of the problem in the school to which the search was directed and the exigency to make the search without delay. The New Mexico Supreme Court supplemented this list with "the probative value and reliability of the information used as a justification for the search."[31]

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[26] *Id.*

[27] *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); M. v. Board of Educ., 429 F. Supp. 288 (S.D. Ill. 1977); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (Wash. 1977); *In re* Ronald V., 61 A.D.2d 204, 401 N.Y.S.2d 544 (N.Y. App. Div. 1978); Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975); Doe v. State, 88 N.M. 347, 540 P.2d 827 (N.M. 1975).

[28] State v. Young, 234 Ga. 488, 216 S.E.2d 586, 592 (Ga. 1975).

[29] State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781, 784 (Wash. 1977).

[30] 34 N.Y.2d 483, 489, 315 N.E.2d 466, 470, 358 N.Y.S.2d 403, 408 (N.Y. 1974).

[31] Doe v. State, 88 N.M. 347, 352, 540 P.2d 827, 832 (N.M. 1975).

Courts vary considerably in construing reasonable cause. For example, in *State v. Young*,[32] an assistant principal directed three students to empty their pockets because, as he approached the group, "one of the fellows jumped up and put something down, ran his hand in his pants." Young had marijuana in his pocket. The Georgia Supreme Court affirmed his subsequent conviction. In contrast, a New York Supreme Court decision found insufficient cause for a search when a student suspected of dealing drugs was seen making two quick trips to the bathroom with another student in the period of an hour.[33] Guidance for the establishment of reasonable cause can be taken from the Supreme Court decision in *Terry v. Ohio*.[34] *Terry* upheld the constitutionality of a stop and frisk search when there was not probable cause to arrest the individual. The court balanced the individual's interest in being free of the search with the great danger posed to the officer and noted:

> And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch", but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.[35]

POLICE SEARCHES AND JOINT POLICE/SCHOOL SEARCHES

The purpose of a search and the nature and extent of police involvement are factors which courts consider in determining the applicable standard for the search. In *People v. Bowers*,[36] the court concluded that a school security officer should be held to the standard of probable cause. Acting on information regarding a stolen watch, the officer stopped a student wearing a coat thought to be similar to that of the thief. The student was not the thief but the inquiry and subsequent search of his pockets disclosed marijuana, some pills and a pipe. In deciding that the security officer should be considered the same as a police officer, the court noted:

> It is clear that the security officer is, at least, a governmental agent clothed with the authority of a peace officer and ultimately responsible to the Police Commissioner. He was placed in the school solely for security purposes and served no educational function.[37]

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[32] 234 Ga. 488, 216 S.E.2d 586 (Ga. 1975).

[33] People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466 (N.Y. Sup. Ct. 1974).

[34] 392 U.S. 1 (1968).

[35] *Id.* at 27.

[36] 77 Misc. 2d 697, 356 N.Y.S.2d 432 (N.Y. Sup. Ct. 1974).

[37] *Id.* at 699, 435.

Generally, courts have held that school officials who initiate searches for school purposes may later turn over any contraband to the police. Courts have upheld subsequent prosecutions when the police become involved only after the evidence was seized. Some early cases approved searches despite fairly extensive police involvement. For example, in *State v. Stein*,[38] policemen investigating a burglary asked to search a high school student's locker. The principal and student each gave consent. The search disclosed a key in a cigarette package which opened a bus station locker containing the stolen items. The Kansas Supreme Court approved the search on the basis of the student's uncoerced consent and the principal's consent to a search of school property.

In *State v. McKinnon*,[39] The chief of police received a call from a confidential informant that high school students were selling amphetamines. The informant described the clothes the students were wearing and the pockets where the "speed" was located. The chief of police called the high school principal who searched the students and discovered the amphetamines. The students were convicted of possession of a controlled substance with intent to deliver. The court held that joint police and school action was not present in this case and observed:

> Both trial courts found that at no time did the chief of police instruct the principal to search the defendants or detain them. We have independently searched the record and find no evidence that the police chief directed or even suggested to the principal that a search should be conducted. He merely relayed the information he had received to the principal, and the principal then acted independently in contacting defendants McKinnon and Yates.[40]

As a rule, however, courts have held that police involvement in the initiation of a search or the search itself require the application of the probable cause standard. School officials acting in concert with the police become agents of the police and, to the extent that a search is conducted by school officials for purposes unrelated to education, the search becomes one subject to the fourth amendment.[41] For example, a federal district court required a showing of probable cause in the following circumstance. The school superintendent received a telephone call informing him that three students were in possession of marijuana at school. The superintendent called in the police and then had the girls searched by school personnel. The court concluded that the purpose of the search was to discover evidence of a crime, not to enforce school rules. Therefore, the search did not meet the standard of probable cause.[42]

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[38] 203 Kan. 638, 456 P.2d 1 (Kan. 1969).

[39] 88 Wash. 2d 75, 558 P.2d 781 (Wash. 1977).

[40] *Id.* at 785.

[41] *See, e.g.*, Picha v. Weilgos, 410 F. Supp. 1214 (N.D. Ill. 1976); Piazzola v. Watkins, 316 F. Supp. 624, *aff'd* 422 F.2d 284 (5th Cir. 1971); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970).

SEARCH OF THE PLACE OR PERSON

The Supreme Court has held that the existence of fourth amendment protection in a particular place depends upon whether there is a reasonable expectation of privacy in that place.[43] The question for school officials and courts to determine is whether students have a reasonable expectation of privacy at school and, if so, where and to what extent. Court decisions reveal a pattern which increases the standard of reasonableness required (extending in some cases to probable case) on a continuum from the student's desk and locker to car, clothes and person. Courts have used the balancing test in *Camara*[44] to determine the extent of the standard which will be enforced. The Court of Appeals for the Second Circuit stated the analysis as follows:

> As the intrusiveness of the search intensifies, the standard of fourth amendment "reasonableness" approaches probable cause.[45]

One court has gone so far as to hold that there is very little, if any, expectation of privacy in a public school. *Stern v. New Haven Community Schools*[46] involved the use of a two-way mirror in the boys restroom. A student was suspended and reported to the police after being observed buying marijuana. The court balanced the school's and student's interests and concluded that the school's responsibility in maintaining discipline was superior to the student's expectation of privacy.

Locker Searches

The searches of desks and lockers are the most common types of searches in public schools. Desks and lockers are usually viewed as property of the school district which has been made available for the convenience of the students. Though a student might have an expectation of privacy in a locker as against other students, that expectation is usually not enforceable against school officials.[47] Factors to consider in determining whether a school district has retained a sufficient interest to permit a locker search without probable cause include: rules and regulations establishing what may and may not be placed in a locker; policies, rules or practice regarding the authority of school officials to search; the provision of locks by the school or maintenance of combination number lists; and the use of consent to search forms in assigning lockers. (*See* Appendix at the end of chapter.)

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[42] *Id.* Picha at 1214.

[43] Katz v. United States, 389 U.S. 347 (1967).

[44] *See* n.4.

[45] M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 588 (2d Cir. 1979).

[46] 529 F. Supp. 31 (E.D. Mich. 1981).

In addition to searching specific lockers upon reasonable cause, school officials may conduct "administrative" searches of all lockers when the purpose is to protect the health or safety of the students or to uncover violations of school rules. School officials should take care to determine that there is reasonable cause for the search prior to instituting it.

Vehicle Searches

The search of students' automobiles has not been the subject of many court decisions. The expectation of privacy in the automobile seems to fall somewhere on the continuum between the privacy of the school locker and the privacy of one's person. The Fifth Circuit Court of Appeals has noted that "cars are the subject of lowered expectations of privacy."[48] Along the lines of court holdings regarding the school's proprietary interest in school lockers and desks, the school could notify students that their cars are subject to search and could condition parking in the school's lot upon consent to search the vehicle.[49] Furthermore, access to the parking lot during classroom hours could be limited and, under such circumstances surveillance of students using the parking lot during school becomes easier and may provide reasonable grounds for searching a car.

Searches of the Person

Searches of the person lie at the other end of the continuum from the relatively less instrusive searches of desks and lockers. The most common search of the person involves a search of the student's purse or

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47. Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); State v. Stein, 203 Kan. 638, 456 P.2d 1 (Kan. 1969); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (N.Y. 1967); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Cal. Ct. App. 1969).

48. 677 F.2d 471, 479 (5th Cir. 1982).

49. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Stein, 203 Kan. 638, 456 P.2d 1 (Kan. 1969); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (Ga. 1975).

pockets. When students consent to the search or voluntarily disclose the contents of their purses or pockets, the search falls within the consent exception to the fourth amendment. Though courts are more exacting in their scrutiny of the cause supporting the search, the standard of reasonable cause has not generally yielded to probable cause for the search of purses and pockets.[50]

Strip searches are a different matter. In *Bellnier v. Lund,*[51] teachers were searching for three dollars which had disappeared in a fifth grade classroom. Prior losses of money, lunches and other belongings prompted a thorough search by the teachers. They began with the childrens' coats, then emptied their pockets, inspected their shoes and finally required the students to go to the restroom where strip searches were conducted. The court invalidated the search because the school officials failed to confine it specifically to suspect children.

Doe v. Renfrow[52] involved the nude search of a thirteen year old junior high school student. The strip search was the culmination of a general search employing drug-detecting dogs. Teams of police officers, trained dog handlers and school officials conducted a three hour inspection of 2,780 junior and senior high school students. The students were confined to their classrooms while the dog teams walked the dogs up and down the rows of desks. The dogs were specially trained to detect drugs and, if one "alerted" on a student, that student was asked to empty their pocket and/or purse. As a result of continuing alerts, nine students were strip searched. The strip searches did not result in the discovery of any drugs. It was later determined that the search dog alerted on the plaintiff because she had been playing with her own dog which was in heat. The court held that the pocket searches were valid but that the strip searches were unsupported by even reasonable suspicion.

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[50] *See, e.g.*, Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979).

[51] 438 F. Supp. 47 (N.D.N.Y. 1977).

[52] 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd*, 631 F.2d 91, *rehearing denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 3015 (1981). *See also*, Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980), M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 588 (2d Cir. 1979).

APPENDIX

SAMPLE POLICY

The ____________ Board of Education recognizes its responsibility to maintain discipline and provide a safe environment for all persons in all schools of the district. District employees are responsible for obeying and enforcing compliance with state statutes, board policies and administrative rules. School administrators are authorized to conduct searches of students and their property as well as property of the district in order to enforce compliance with statutes, policies and rules.

A search may be conducted when an administrator determines there is reason to believe it could disclose evidence of the violation of a statute, policy or rule. Administrators are also authorized to conduct area-wide searches (e.g. searches of all student lockers) on the same basis and for reasons of safety and health.

When a search is part of a criminal investigation conducted in cooperation with the police or is intended to discover evidence to be used exclusively in a criminal proceeding, the police shall be made responsible for the search.

The superintendent shall develop rules and regulations for the administration of this policy. The superintendent shall be responsible for notifying all faculty and students of the administrators' authority to conduct searches.

SAMPLE NOTICE TO STUDENTS

All students are responsible for obeying state law, policies of the board of education and rules of the school. No student should bring anything to school which is prohibited by statute, policy or school rule. The administration has the authority to search school property, student property (including cars) and students themselves when there is reason to believe a student has violated a statute, policy or rule.

Lockers and desks are the property of the school district and are made available to students for their convenience. Each student is responsible for the contents and security of his or her locker. Lockers should be kept locked at all times when they are not open for use. Each student is responsible for locking his or her locker after use and no student should reveal the combination to anyone else.

The administration has the authority to inspect all lockers at any time.

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Legal Aspects of Pupil Evaluation

Leland D. Melvin

Dr. Melvin is Professor of Educational Administration and Assistant Dean in the School of Education at Indiana State University, Terre Haute. Among his many duties is Chairperson of the Annual School Law Conference. Dr. Melvin received his Ed.D. from Indiana University. He has had experience as a teacher, principal and superintendent of high schools and was an administrator in state board of education and state department of public instruction. He has many publications to his credit and has been active in the field of school law.

INTRODUCTION

Legal issues do not necessarily fit into discrete categories. For example, a problem of placement of a child may become intermingled with desegregation matters. Another placement problem might become entangled with the education of the handicapped law. The issues of minimum competency testing sometimes bear upon the award of a diploma. The intent of this chapter is to emphasize the pupil evaluation concerns at the expense of other legal principles; however, complete separation is not always possible.

ADMISSION

The courts have generally held to the principle that "assignment of pupils as a matter of educational philosophy or social policy is not a subject which is normally within the jurisdiction of the court; . . ."[1] Nevertheless, numerous complaints have been filed seeking relief from alleged injustices relating to the admission or assignment of pupils.

Parents will often challenge the rules and regulations of school districts which deal with admission of pupils to kindergarten or first grade. Parents of a New York five-year-old child wished to enroll the pupil in the first grade. School officials maintained the child was too young for first grade and should enter kindergarten. The parents countered that the child could not be forced to enter kindergarten because state law did not require it. The court held that once a school district had established kindergarten as a part of its system, the board had the right to promulgate rules and regulations based on ability, not age. Further the court ruled that even though a child of five years of age has the right to enter school, parents cannot insist that the child be admitted to a specific grade.[2]

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[1] Keyes v. School Dist. No. 1, 474 F. Supp. 1265 (D. Colo. 1979).

An Illinois school denied a kindergarten pupil admission to first grade because the pupil failed the readiness test for first grade. The court ruled that since the child was seven years old, the school must admit him even without the readiness examination.[3] The validity of the readiness test was not an issue in the case.

In a New York case, parents of a child petitioned the school board to admit the child to the first grade following the child's attendance at a kindergarten not registered with the state. The school board held that the child must enroll in kindergarten to determine if the private school was equivalent to the public school. The court upheld the school board's decision.[4] The court also upheld testing as a basis for placement.

In another New York case, parents were taken to court in a child neglect case when they refused to send their child to kindergarten. The parents wanted to place the child in first grade. The child had attended kindergarten in 1953-54, but had attended no school in 1954-55. At age seven, in 1955-56, the child failed the readiness test for first grade and the schools denied admission. The court determined the local school could not *compel* the student to attend or to pass kindergarten.[5]

A Maine parent challenged the constitutionality of a Maine statute requiring a pupil to be six years of age on or before October 15 of the school year. The court determined that the statute violated neither the equal protection clause nor the due process clause of the fourteenth amendment.[6]

An interesting case developed in Pennsylvania. A child met the age requirements and entered kindergarten in one school district. However, when the child transferred to another district, he did not meet the age requirements. School officials in the second district denied the student admission and the parents sued. The court ruled that schools have the authority to establish age requirements and to deny entry to those who do not meet the requirements.[7] The court reiterated, "The courts are in no position to function as super school boards."[8]

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[2] Isquith v. Levitt, 137 N.Y.S.2d 493 (N.Y. Sup. Ct. 1974), *aff'd* 137 N.Y.S.2d 497 (N.Y. App. Div. 1974).

[3] Morgan v. Board of Educ., 317 N.E.2d 393 (Ill. App. Ct. 1974).

[4] Silverberg v. Board of Educ., 303 N.Y.S.2d 816 (N.Y. Sup. Ct. 1969).

[5] *In re* Winters, 146 N.Y.S.2d 107 (N.Y. Childrens Ct. 1955).

[6] Hammond v. Marx, 406 F. Supp. 853 (N.D. Me. 1975).

Finally, two court decisions[9] confirmed the authority of school boards to make reasonable rules and regulations concerning the entry requirements of pupils. In essence, the cases cited ruled that a child could not enter school upon reaching legal starting age where the legal birth date occurs after the cut-off date.

ASSIGNMENT

Boards have broad powers in establishing admission criteria for pupils. Likewise, the courts generally support school boards in their authority to determine placement of these pupils. Only when a violation of constitutional or statutory rights of a student occurs, will the courts intervene in this matter. Several court cases illustrate this concept.

In an Ohio case,[10] a bright boy was in the fifth grade at age seven. The pupil wished to skip the sixth grade and enter grade seven at the age of eight. School officials denied the request, expressing concern about the age and maturity of the child. A lower court held for the child, saying he had met all the requirements and should be placed in the seventh grade. The Supreme Court of Ohio reversed, holding that the lower court based its decision on the qualifications of the pupil. The supreme court declared that only the board of education has the lawful right to make this decision.

Bray v. Lee[11] presents an interesting situation. The Boston Latin School operated on the premise that there were 3000 places for boys and 1500 places for girls. During a particular school year, school officials determined the number of available openings for each sex. Using test scores, the officials counted down from the top to obtain the number of students of each sex. This resulted in boys being selected with a test score of 120, while the test score required for girls was 133. The court ruled that this was sex discrimination, and ordered the school to use the same score for both sexes in determining qualification for admission.

A Kansas board of education denied entrance to pupils from a parochial school to the public school until they had successfully passed a test. The parents objected and filed suit. In examining the facts, the Supreme Court of Kansas determined that the teachers in the parochial school were state certified, that the curriculum, textbooks, and tests were identical in both schools. The school officials recognized these facts, but maintained they could not be sure the pupils were equally prepared until they administered the examination. The court observed that the board apparently wanted to delay admission until after the administration of the test simply because state statute authorized it. The court held for the pupils but pointed out the decision did not constitute adjudication for future cases.[12]

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[7] O'Leary v. Wisecup, 364 A.2d 770 (Pa. Commw. Ct. 1976).

[8] *Id.* at 774.

[9] Detch v. Board of Educ., 117 S.E.2d 138 (W. Va. 1960); State *ex rel.* Ronish v. School Dist. No. 1 of Ferges Cty., 384 P.2d 797 (Mont. 1960).

[10] Board of Educ. of Sycamore v. State, 81 N.E. 412 (Ohio 1909).

[11] 337 F. Supp. 934 (D. Mass. 1976).

The New York City board of education had established a chronological age requirement for an accelerated class which could complete three years of junior high school in two years. The parent of a pupil who was six months below the required age sued the school board when his son was denied admission to the accelerated program. The court ruled that the school board had acted in good faith within its scope of authority. Among other statements, the court declared "... nor may the court seek to substitute its judgment in that area for respondent's expertise."[13]

GRADE REDUCTION

School authorities have used the technique of sanction against students for many years. In some instances the sanction takes the form of grade reduction for various violations of school rules or policy. Earlier practices of such sanctions usually went unnoticed; however, with the surge of interest in individual rights, school officials often find themselves in court following the imposition of these sanctions. As will be pointed out in the following discussion, students and/or parents are often successful in having these sanctions set aside.

A Kentucky student who violated school rules was suspended from school as punishment for his misbehavior.[14] The school determined that the absence during the suspension constituted unexcused absence and reduced his grades by five points for each day he was absent. This reduction in daily grades caused a reduction of one letter grade in three of five classes in which the student was enrolled.

The trial court held the school regulation was invalid and ordered the grades restored. The school board appealed the decision. The court of appeals affirmed, stating that the Kentucky statute authorizing the suspension preempted the school board's authority to impose additional punishment for the conduct that results in suspension.[15]

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[12] Creyhon v. Board of Educ., 163 P.2d 145 (Kan. 1917).

[13] Ackerman v. Rubin, 231 N.Y.S.2d 112 (N.Y. Sup. Ct. 1962).

[14] Dorsey v. Bales, 521 S.W.2d 76 (Ky. 1976).

A Colorado court ruled in a similar manner.[16] The school district had a school regulation which provided that a student would be denied credit in any class in which more than seven absences occurred in a semester. Two brothers were absent in excess of seven days in one semester and were denied credit. The students and their parents brought suit seeking declaratory judgment and judicial review of the order of the board of education.

The trial court ruled that the attendance policy was contrary to state law and thus null and void. The court ordered the students be allowed credit for the semester upon successful completion of all other academic requirements. The court of appeals affirmed, pointing out that state statute requires 172 days of attendance, but included in those days are days in which students are temporarily ill or injured or have been suspended or expelled.[17]

The Illinois Appellate Court ruled that a student has the right to be heard on the legality of grade reduction.[18] An Illinois student left school without permission and without advising any teacher or staff member. On returning to school the following Monday, the student presented a note from her mother excusing her absence. School officials informed the student that such absences were unexcused, and her grades would be lowered by three percent for each class missed. Plaintiff filed suit challenging the right to reduce her subject grades as punishment for an unauthorized absence from school. The trial court dismissed the complaint, and the student appealed.

The appellate court held the student was

> entitled to be heard on the question of whether the grade reduction sanction for unauthorized absence is an approved policy of the Board; what, if any, procedural remedies are available to plaintiff before such serious sanctions may be applied; and whether its application arbitrarily and capriciously results in a grade reduction without a subjective determination of a classroom teacher.[19]

Thus the court of appeals reversed and remanded the lower court ruling.

In another Illinois case, the court upheld the school's authority in reducing grades for unexcused absences.[20] Kevin Knight missed two days

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15. *Id.* at 78.
16. Guitierrez v. School Dist. R-1, 585 P.2d 935 (Colo. 1978).
17. *Id.* at 937.
18. Hamer v. Board of Educ. of Twp. High School, 383 N.E.2d 231 (Ill. App. Ct. 1978).
19. *Id.* at 234.
20. Knight v. Board of Educ., 348 N.E.2d 299 (Ill. App. Ct. 1976).

of classes. The school determined the absences were unexcused and reduced plaintiff's grades two letter grades in the classes missed. Knight filed suit, seeking mandamus to have grades recomputed, to have old grades expunged, to have the rule declared void, and to enjoin all defendants from enforcing the rule.

The trial court ruled for the defendant and Knight appealed. The American Civil Liberties Union and the Illinois State Board of Education filed briefs *amicus curiae* suggesting the judgment be reversed. The court rejected arguments that the rule violated the plaintiff's substantive due process rights guaranteed by both United States and Illinois Constitutions. The appellate court, with one dissenting vote, affirmed the trial court decision.

In yet another Illinois case, the appellate court again upheld the school board's right to reduce grades.[21] In this instance, Donaldson was involved in a fight with another boy. School officials administered corporal punishment to one of the boys. Since Donaldson's mother had filed written objection to corporal punishment, he was suspended for three days. It happened that certain examinations were being given during the suspension. Since Donaldson missed the examinations, his grades were reduced.

Donaldson filed suit, arguing that some other form of punishment would have been less disruptive to his education. The trial court held that plaintiff did not have a cause of action. Donaldson then appealed the case. Plaintiff did not argue that the three-day suspension *per se* was excessive, but he did emphasize that the suspension took place during examination. The court observed that the examinations were administered in October and thus did not threaten a semester grade or the completion of a course. The court also noted that since the plaintiff was a seventh-grader, grades were of less importance to future considerations than they would be for high school pupils. The court further determined that the suspension was not an arbitrary act and affirmed the trial court's decision.

A Texas case concerning grade reduction resulted in an enlightening decision.[22] Parents of a high school girl filed suit when the school deducted three points from a six-week grade for unexcused absences from the class. The deduction did not significantly alter the student's grade point average and did not change her class standing. Parents sought damages and injunctive relief arguing the penalty was arbitrarily imposed in violation of the fifth and fourteenth amendments.

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[21] Donaldson v. Board of Educ. of Danville, 424 N.E.2d 737 (Ill. App. Ct. 1981).

[22] Raymond v. Alvord Indep. School Dist., 639 F.2d 257 (5th Cir. 1981).

The district court did not address the constitutional issues, but did order the three points restored to student's grade. The court refused to award damages, and plaintiff appealed. The Fifth Circuit did not consider the constitutional issues raised. The court declared that the matter was insignificant and that the district court had abused its discretion by adjudicating the pendent state claim. The court stated:

> When litigants improperly invoke the aid of a federal court to redress what is patently a trifling claim, the district court should not attempt to ascertain who was right or who was wrong in provoking the quarrel but should dispatch the matter quickly.[23]

The court of appeals reversed the district court and ordered it to dismiss the complaint for want of subject matter jurisdiction. It appears that plaintiff's zeal in pursuit of damages resulted in loss of the whole ball game.

A Missouri high school pupil received a grade of "F" in band and in chorus because he missed the Christmas concert. The family apparently was on a vacation to Hawaii at the time of the concert, and the student's absences were unexcused by the instructors. The trial court ruled that the Christmas concert did not violate first amendment provisions, that the student had previous notice that unexcused absence would result in an "F" grade, and that student was absent from the performance without giving notice.

The court found for the defendant school district and ordered plaintiff to pay court costs.[24] The case has been appealed to the Missouri Court of Appeals.

USE OF STANDARDIZED TESTS

Educators have made use of standardized tests for a long period of time and the appropriate use of test results has been a matter of controversy for a long period of time. One of the early challenges to the use of standardized tests came in *Hobson v. Hansen.*[25] The case was concerned with placement within tracks of pupils in the schools of the District of Columbia. Plaintiffs alleged that reliance upon standardized tests for determining placement denied them equal education opportunity and, in effect, perpetuated a segregated school system. The plaintiffs further alleged that the tests were standardized primarily on white children with the result that disadvantaged Negro children were placed in the lowest sections. Students in the lowest sections allegedly received reduced education and this amounted to violation of equal protection rights guaranteed by the constitution.

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[23] *Id.* at 258.

[24] Johnson v. Shineman, No. 381-299CC (Mo. Gentry Cty. Ct. 1982).

[25] 269 F. Supp. 401 (D. D.C. 1967).

School officials maintained that several factors were considered in tracking placement. The factors included (1) grades, (2) classroom performance, (3) maturity, (4) emotional stability, (5) physical condition, (6) attitude, and (7) performance on standard achievement and scholastic aptitude tests.[26] The court was not convinced, however, and concluded that proper operation of the track system practically demanded reliance on test scores.

The importance of the classroom teacher in all aspects of a student's school life was recited by the court in the following quotation.

> As a practical matter, the burden of the placement decision rests with the teacher. The teacher is the one, who through daily contact with the student, presumably knows him best. Equally important, it is the teacher who gives the grades and records the comments that go into making up the students "paper image," which follows him through school as a part of his file; and it is the teacher who, in the day-to-day teacher-pupil relationship, greatly influences how the student acts and how well he succeeds in school.[27]

The court ordered the school system to cease its practices of discrimination on the basis of racial or economic status and permanently enjoined the school district from operating the track system.

Several court cases concerning the use of standardized tests which perpetuated segregated classes were heard in the early 1970's. One such case involved a school in Louisiana.[28] The school system had adopted a homogeneous non-graded group for one of its elementary schools. The homogeneous groups were determined on the basis of achievement and aptitude test results. The court ordered an all black school to be integrated with this white school. The all black school had been grouped heterogeneously. Upon integration, the school officials elected to go with the homogenous, non-graded organization. However, the groups were determined on reading scores only.

This resulted in de facto segregation within the school, since the lower level classes were practically all black, while the upper level classes were practically all white. The court was persuaded that testing as used in the Franklinton Elementary School denied plaintiffs equal protection of the law. The court cited several other cases which prohibited testing as a means to perpetuate desegregated schools.[29]

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[26] *Id.* at 475.

[27] *Id.* at 474.

[28] Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir. 1972).

A recent court case in Alabama has upheld the testing and placement procedures of a school district.[30] Defendant school district had operated Valley Grande Elementary School as a non-graded school since its opening in 1969. School officials deemed the program successful and extended this type of organization to all schools with the opening of the 1979-80 school year.

Tests used to determine placement in the non-graded school were the Houghton-Mifflin placement test and the math placement test. The school district had adopted a positive program of informing parents about how the non-graded program worked and provided parents with a well-defined grievance procedure. Plaintiffs alleged the testing and placement procedures violated the property rights and due process guarantees of the fourteenth amendment as well as Alabama statutes. The court rejected all of the allegations. In part, the court stated:

> The placement tests used by defendants are a perfectly acceptable way to place students within instructional groups. The tests do not infringe any property interests of the plaintiffs. . . . If anything, the placement tests help to reassure that students will utilize their property right—their right to a public education—to the fullest.[31]

The important difference in this case and earlier cases is that there was no evidence here of perpetuating segregated classes. The court was persuaded that the school made extensive efforts to treat all parties equally and without prejudice.

The *Larry P.* case may be the classic in court cases concerned with standardized tests. In 1972, plaintiffs filed in federal district court seeking to enjoin defendants from using I.Q. tests for purposes of placing blacks in classes for mentally retarded.[32] The defendant in the case was the San Francisco Unified School District. Plaintiffs contended they were not mentally retarded and that they had been placed in EMR classes on the basis of tests which were biased against the culture and experience of black children as a class, in violation of their fourteenth amendment rights.

After examining state laws, California Department of Education policies and defendant's procedures, Judge Peckham concluded that defendant school district placed substantial emphasis on I.Q. tests for placement of children in classes for mentally retarded. Since the evidence of racial unbalance in these classes was irrefutable, the court concluded that defendants must prove that use of I.Q. tests was justifiable. Defendants were unable to do so to the satisfaction of the court.

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[29] United States v. Sunflower Cty. School Dist., 430 F.2d 859 (5th Cir. 1970); Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1969); United States v. Tonica Cty. School Dist., 421 F.2d 1236 (5th Cir. 1970).

[30] Smith v. Dallas Cty. Bd. of Educ., 480 F. Supp. 1324 (D. Ala. 1979).

[31] *Id.* at 1388.

[32] Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

Plaintiffs had sought a number of reliefs in requesting a mandatory injunction. These include (1) elimination of all culturally biased tests, (2) immediate evaluation of black students already in EMR classes, (3) supplemental education of those students wrongfully placed in EMR classes, (4) use of minority group psychologist and consultants in evaluating pupils, (5) establishment of racial ratios for EMR classes.

Judge Peckham took note of certain efforts made by defendant as well as possible alternatives to the methods of classifying students. Accordingly, he ordered the defendant to cease placing black students in EMR classes on the basis of criteria which places primary reliance on the results of I.Q. tests as currently administered, if the consequences were racial unbalance in such classes. The judge did not grant other relief sought by plaintiffs, stating:

> defendants should be provided as much flexibility as possible in formulating a classification system which comports with constitutional requirements.[33]

The San Francisco school district appealed. The court of appeals ruled, *per curium*, to affirm the decision without expressing any opinion as to the ultimate merits of the case.[34]

In 1974, the court expanded the class to include all black California school children who have been or may in the future be classified as mentally retarded on the basis of I.Q. tests. A voluntary moritorium on use of I.Q. tests for EMR placement of all children in California, regardless of race, was imposed in 1975. Plaintiffs amended their complaint to include violations of Civil Rights Act of 1964, the Emergency School Aid Act, Education For All Handicapped Children Act, and the Rehabilitation Act of 1974. The United States Justice Department participated as *amicus curaie* on behalf of the plaintiffs.[35] Defendants made various motions to dismiss for summary judgment, all of which were denied.

After a lengthy hearing, the court granted permanent injunctive relief against the use of I.Q. tests in placing students in EMR classes without first gaining permission from the court. Requirements of the California State Board of Education to gain permission included the following:

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[33] *Id.* at 1315.

[34] Larry P. v. Riles, 502 F.2d 963 (9th Cir. 1974).

[35] Larry P. v. Riles, 495 F. Supp. 935 (N.D. Cal. 1979).

(1) Make a written request to the court stating the standardized intelligence test or tests to be approved. The request must be authorized by a majority of the Board, and it must state whether the Board has determined that the test or tests (a) are not racially or culturally discriminatory, (b) will be administered in a manner which is nondiscriminatory in its impact on black children, and (c) have been validated for the determination of E.M.R. status or placement in E.M.R. classes.

(2) Accompanying this application with supporting evidence produced under oath, which must include: (a) statistics on the average or mean scores of blacks and whites on the test or tests, (b) statistics or other data reported separately for blacks and whites, which form the basis for the Board's determination that the tests are validated for the purpose(s) for which they are to be used, and (c) a certification that the State Board has held open public hearings on the proposed test or tests before reaching its determination.[36]

The court decision further ordered defendant to render and eliminate disproportionate placement of black children in California EMR classes. Additionally, each school district in California was ordered to reevaluate every black child identified as an EMR pupil. For each pupil found to have been misdiagnosed, an individual educational plan was to be devised which specified the supplemental assistance required to allow the pupil to return to the regular classroom.[37]

THE PRIVACY OF TEST RESULTS

The Family Educational Rights and Privacy Act of 1974 is the subject of discussion in two interesting court cases. The Act, commonly known as the Buckley Amendment, provides certain rights to parents and students with respect to educational records.

In *Mattie T.*,[38] the court ordered the custodian of certain records to appear in court and produce documents used to screen students for placement of handicapped students in specialized classes. Several points of civil procedure were included in the case. The primary ruling relating to FERPA was that the person in possession of the documents must produce the same when ordered by the court, provided that the subpoena included conditions for covering up the information which might tend to identify individual students. The court further ruled the cost and burden of reproducing the documents was not sufficient reason to disregard the subpoena.

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[36] *Id.* at 989-90.

[37] *Id* at 990.

[38] Mattie T. v. Johnston, 74 F.R.D. 498 (N.D. Miss. 1976).

Rios v. Read[39] was a class action suit wherein plaintiffs sought relief from alleged violations of equal protection resulting from failures to provide adequate educational programs for students of Hispanic background. The plaintiffs sought certain school records which the defendant refused to provide. Specifically, the plaintiff sought test results including names, addresses, schedules and ethnic identity of school dropouts, and "bilingual identification cards" of students in bilingual programs.

School officials objected to providing identifying information claiming that to do so would violate FERPA and to do so would create dissention and unrest as well as to place enormous administrative problems on the school district. The court ruled that in this case the genuine need for the information requested by the plaintiff outweighed the privacy interests of students.[40] Consistent with *Mattie T.*, the court ruled that the burden of producing the information was insufficient reason for not providing it.

Following the decision of civil procedure, the *Rios v. Read* case was heard in federal district court where the court ordered the school district to provide a bilingual program which would conform to the *Lau* guideline.[41] The decision was also cited as an important legal principle in *United States v. State of Texas.*[42]

An interesting case regarding privacy of test results arose in New Jersey in 1975.[43] The state board of education had initiated an Educational Assessment Program (EAP) to determine statewide educational goals, to assess current status of education in relation to those goals and to recommend programs to approach the goals. Part of the EAP was to administer statewide programs to approach the goals. Part of the EAP was to administer statewide tests in reading and mathematics to the 4th and 12th grades in the school throughout the state. According to the plan, the raw scores of these tests with respect to school, district, county, and state, along with interpretive data, would be released to the public. It is emphasized that test scores of individual pupils were not released.

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[39] 73 F.R.D. 589 (1977), 480 F. Supp. 14 (E.D.N.Y. 1978).

[40] *Id.* at 599.

[41] 480 F. Supp. 14 (E.D.N.Y. 1978).

[42] 506 F. Supp. 433 (D.N.J. 1981).

[43] Chappell v. Commissioner of Educ. of New Jersey, 343 A.2d 811 (N.J. Super. Ct. App. Div. 1975).

Parents of students filed this case claiming the release of the test results would: (1) violate their constitutional, statutory, and common law rights; (2) cause polarization within school communities, racial conflict, and degrading stigmatization; (3) subject them to unfair accountability proceedings; and (4) invade their right of privacy. The court affirmed the decision of the state board of education, upholding the validity, usefulness and reliability of the achievement tests and ruled that the dissemination of the results of such tests together with interpretive materials was not arbitrary, capricious or unreasonable. Review by the New Jersey Supreme Court was denied.[44]

Contrasting the thrust of the *Chappell* case, the plaintiff in another New Jersey case went to court to force the release of results of a standardized testing program.[45] Citizens for Better Education sought to have the results of standardized tests released on a school by school and grade by grade basis. Individual students scores were not sought. The New Jersey Commissioner of Education reasoned that the matter was one of discretionary power of the school board. Since the local board of education was under no mandate to administer such tests, the results of the tests were not subject to New Jersey's "right to know law." The court disagreed and ordered that the petitioners be given the right to inspect and copy the reports.

One court case decided several years prior to the passage of FERPA may have been a sign of things to come. The Acting Commissioner of Education of New York had advised school district officials not to release records of students to anyone (including parents) because there were no statutes authorizing such action. In *Van Allen v. McCleary*,[46] the plaintiff referred his son to a private physician for psychological treatment. The psychologist requested, and received, the patient's psychological records from the school. The applicant then requested all school records for his son and was denied. The court held that in the absence of constitutional, statutory, or administrative permission or prohibition, a parent is entitled to the records of his child maintained by the school authorities as required by law.

Finally, one case illustrates the possible danger of releasing test information. In a 1956 Utah case,[47] appellant engaged the services of a psychologist/psychiatrist team for treatment of claustrophobia. The psychologist administered a Stanford-Binet intelligence test and reported the client had an IQ which would classify her as "feeble-minded at the high-grade moron level of general mental ability." The test results were returned to the plaintiff's school and subsequently were shown to plaintiff's mother. The suit ensued in which the psychologist was sued for libel. The mother claimed the defendant had no authority to administer the Stanford-Binet test. The court held, however, that plaintiff had voluntarily submitted herself to a qualified, recognized psychologist, and having done so, could not prescribe the diagnostic procedure incident to such treatment. The court further ruled that defendant had followed established procedure and that his report was as accurate as it could be. While libel is not the subject of this discussion, this case illustrates the care that is required in following legal procedure for reporting the results of tests.

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[44] 351 A.2d 12 (N.J. Super. Ct. App. Div. 1975).

[45] Citizens for Better Education v. Board of Educ. of Camden, 308 A.2d 35 (N.J. Super. Ct. App. Div. 1973).

[46] 211 N.Y.S.2d 501 (N.Y. Sup. Ct. 1961).

[47] Iverson v. Grandsen, 237 F.2d 898 (10th Cir. 1956).

GRADUATION AND DIPLOMAS

One of the older court cases involving the issuance of diplomas occurred in Kansas in 1927.[48] Kathleen Ryan was found with notes in her possession during a history examination. School rules prohibited possession of notes during the examination and the rule stated that anyone giving or receiving help on an examination would be given "zero." The teacher, Miss Walker, and Kathleen reported to the principal who, unable to resolve the issue, called a faculty meeting to discuss it. The faculty voted 14-1 (Miss Walker casting the one dissenting vote) against the student.

The principal reported the results of the faculty vote to the superintendent along with a letter stating that Kathleen would receive no credit in American History and could not graduate. The superintendent, after listening to the teacher and the student, ordered a second examination. The teacher gave the second exam at 2:30 p.m. on graduation day. However, the principal instructed the teacher not to record the grade. The faculty, hearing of the second exam, held another meeting and sent a letter to the school board. The communication protested the superintendent's action in overruling faculty action and urged that Kathleen not be permitted to appear with the graduating class that evening. The school board voted to uphold the action of the faculty and denied Kathleen her diploma.

At trial the court heard testimony from the parties and decided in favor of the student. The court determined that the board of education failed to establish that Kathleen had received any aid on her exam.

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[48] Ryan v. Board of Educ., 257 P. 945 (Kan. 1927).

Since there was no penalty for the mere possession of notes, there was no cause to deny credit for the course. The court ruled that Kathleen was entitled to a passing grade in American History, that she completed the high school course of study, and that she was entitled to a diploma.

The board of education appealed to the Kansas Supreme Court which upheld the district court ruling. The case was remanded with instructions to award credit and a diploma. One of the justices dissented, saying the court had no substantial reason to substitute its judgment for that of the faculty and the board of education. The outcome of this early case is not always consistent with the cases which follow.

Parents of a Pennsylvania pupil brought suit over a failing grade and subsequent denial of permission to participate in graduation exercises. The student successfully completed the sex education course during summer school and was awarded her diploma. The suit charged, among other things, that the examination was "grossly misleading and capriciously graded." The court ruled that the school district's graduation and curriculum requirements were within state law. Further, the court reasoned that the courtroom is not the proper forum for personal conflicts between parents and school officials.[49]

In another Pennsylvania case, parents sought to dictate the courses to be taught, the manner of examination of pupils, and determination of requirements for promotion. The Supreme Court of Pennsylvania upheld the lower court which cited numerous state cases which ruled (1) the courts are in no position to determine the policy of school administration, (2) a court is not a super board of directors with superior knowledge of school administration or the science of pedagogy, and (3) discretion of school authorities will be interferred with ony when there is clear abuse of the discretion.[50]

A vocational-technical school student in practical nursing was dismissed from the program prior to completion of deficiencies in the clinical portion of program. Plaintiff initiated litigation upon dismissal.[51] The district court granted defendant's motion for summary judgment and dismissed the case, whereupon plaintiff appealed.[52]

On appeal, plaintiff alleged she was denied her contractual and due process for the following reasons: (1) she was dismissed as a student without any just cause, (2) she was not provided rights in conformance with rules outlined in the student handbook, and (3) several procedural due process rights were denied. She further alleged her dismissal was without sufficient legal cause.

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[49] Aubrey v. School Dist. of Philadelphia, 437 A.2d 1306 (Pa. Commw. Ct. 1981).

[50] Regan v. Stoddard, 65 A.2d 240 (Pa. 1949).

[51] The case was first filed in United States District Court, Western District, Oklahoma.

[52] Gasper v. Bruton, 513 F.2d 843 (10th Cir. 1975).

The court observed that the issue involved was one of academic performance and in matters involving educational deficiencies, final determination rests with school officials.[53] To meet due process in such matters, all the school officials are required to do is to make student aware prior to termination that he has failed to meet the required standards. The court determined that plaintiff had been provided with much more due process than ordinarily required. The court stated:

> [W]hen presented with a challenge that the school authorities suspended or dismissed a student for failure re academic standards, the court may grant relief . . . only in those cases where the student presents positive evidence or ill will or bad motive.[54]

Failing to find ill will or bad motive, the court of appeals upheld the lower court, affirming dismissal of the case.

Two Missouri cases had adhered to the principle that although a graduation rule may be reasonable, the rule may not be applied unreasonably, capriciously, arbitrarily or inequitably to deny a diploma to qualified candidates.[55] The cases are similar in that the plaintiffs had accrued the necessary number of credits, but the school officials maintained plaintiffs had not attended the required amount of time. Evidence in both cases indicate that other students in similar circumstances had been awarded diplomas. In both cases, the court upheld the plaintiff and mandated school officials to award the diploma.

Two cases from schools other than public elementary and secondary schools are cited with respect to issuance of diplomas. In a community college case the appellant had taken a certain course in a nursing degree program for the second time and came up with a grade of 69.713. A passing mark was 70. The institution refused to award the nursing degree. Plaintiff filed suit and asked the lower court to "round off" the grade to the passing mark. The lower court held it was arbitrary and capricious to fail a prospective graduate by .287 of a point and granted the plaintiff's plea. The court of appeals reversed, however, saying the court would not substitute its opinion for college policy.[56]

A private school case involved Angelo Fiacco who sought to graduate early from Albany (N.Y.) Academy. The academy had a policy which permitted early graduation under certain conditions. However, the faculty of the academy did not feel that Angelo was qualified for early graduation and denied his request. The lower court held for the plaintiff but the higher court reversed, saying that the issue was an academic matter clearly within the professional judgment and discretion of the academy faculty, and the court would not intervene in the exercise of the judgment and discretion so long as it was not arbitrary and capricious.[57]

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[53] *Id.* at 850.

[54] *Id.* at 851.

[55] State *ex rel.* Miller v. McLeod, 605 S.W.2d 160 (Mo. Ct. App. 1980); State of Missouri v. Ledbetter, 559 S.W.2d 230 (Mo. Ct. App. 1970).

[56] McIntosh v. Borough of Manhattan Commun. College, 433 N.Y.S.2d 446 (N.Y. Sup. Ct. 1980).

MINIMUM COMPETENCY TESTING

Minimum competency testing with all the concomitant controversy has arisen from the public's demand for accountability. Minimum competency sometimes called functional literacy, requires demonstration of academic proficiency rather than mere attendance for the time stipulated and the accumulation of a specified number of credits.

The current round of litigation in this area first surfaced in Florida in 1979. The Florida legislature passed the Educational Accountability Act in 1976 establishing standards for graduation from Florida high schools. The standards included (1) completion of a minimum number of credits, (2) mastery of certain basic skills, and (3) satisfactory performance in functional literacy. The program of educational accountability was to be implemented beginning with the 1978-79 school year. The 1976 statute was amended in 1978 to include passage of a functional literacy test prior to receipt of a state high diploma.

The results of the early administration of the Florida State Student Assessment Test, Part II (SSAT II) showed that black students failed to a much greater degree than did white students. A class action suit was filed against the Florida Commissioner.[58] Plaintiffs were certified in three classes: Class A—all students in the State of Florida who have failed or who hereafter fail the SSAT II; Class B—all black students in the State of Florida who had failed or who hereafter fail the SSAT II; and Class C—all black students in Hillsborough County, Florida, who have failed or hereafter fail the SSAT II.

Classes A, B and C claimed that *Turlington* designed and implemented a testing program which is racially biased and violates the equal protection clause of the fourteenth amendment. These classes also claimed that defendants also violated the fourteenth amendment in instituting a program denying diplomas without sufficient notice or time to prepare for the exam. Classes B and C also claimed that the

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[57] Fiacco v. Santee, 421 N.Y.S.2d 431 (N.Y. App. Div. 1979).

[58] Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979).

SSAT II violated the fourteenth amendment in that it was a device for resegregating Florida's public schools because those failing the test were placed in remedial classes which tended to contain more blacks than whites.

The district court found that the statute requiring the functional literacy test violated the equal protection and due process clauses of the fourteenth amendment. Further, the defendants were enjoined from using the test as a requirement for graduation until the 1982-83 school year. However, the court ruled that use of examination for remediation violated neither the Constitution nor statutes.[59] The defendants appealed, contending the lower court erred in finding the testing program violated fourteenth amendment provisions. Plaintiffs cross appealed, contending the district court erred in limiting the period of injunction to four years and in upholding the validity of the examination.

The Fifth Circuit reviewed the record of the lower court and handed down its decision in 1981.[60] That court reasoned that the state of Florida had the right to condition the receipt of a diploma upon the passing of an exam so long as the test is a fair test of that which is taught. Additionally the court affirmed the lower court's decision that the test did have construct validity in that it did test functional literacy as defined by the state board of education and that the functional literacy test examination bears a rational relation to a valid state interest.[61]

The court held, however, that the test violated the constitutional rights of plaintiffs for at least three reasons: (1) the diploma sanction was implemented on too short a notice; (2) the diploma sanction punished black students for deficiencies created by the dual school system; and (3) the test may have covered matters not taught in the schools of the state. The court stated,

> We hold . . . that the State may not deprive its high school seniors of the economic and educational benefits of a high school diploma until it has demonstrated that the SSAT II is a fair test of that which is taught in its classrooms and that racially discriminatory impact is not due to the educational deprivation in the "dual school" years.[62]

Thus the court remanded the case to the lower court to determine whether or not the test was examining what was being taught in the classrooms. Once the curricular validity was established, the court assumed it would be called on to look into the role and effect of "vestiges" of past discrimination upon black students resulting from the dual school system.

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[59] *Id.* at 268.

[60] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

[61] *Id.* at 406.

[62] *Id.* at 408.

Two other court cases challenged certain aspects of the Florida testing law. John Brady complained that the rules were written in such a way to operate in retrospect. That is, scores on the test taken before the rule was adopted were to be considered in determining students' eligibility for a diploma. The court of appeals held that the rule was valid as against due process objectives.[63] Brady also charged that scoring criteria were invalid because the commissioner of education adopted such criteria in violation of state statute. The court ruled in favor of the commissioner.[64]

Georgia seniors asked the local school board to drop a policy requiring graduating seniors to pass a math and reading skills test at a level required of incoming freshmen. The board denied the request. The students appealed to the state board of education, and the request was again denied. The students then filed suit to enjoin the school district from imposing the minimum competency test as a prerequisite to graduation. The Georgia Court of Appeals upheld the district's right to promulgate policy reasonably related to the state's interest in educating youth.[65]

Anderson v. Banks[66] presents an interesting study with respect to exit examinations as a requirement for graduation. The Tattnall County School District adopted a policy stating that beginning with the graduating class of 1978, all graduates must achieve a grade equivalency score of 9.0 on mathematics and reading sections of the California Achievement Test (CAT). This was in addition to already existing requirements for graduation.

The issue in this case was traced back to the abolishment of the dual educational system of the county. A tracking system was introduced which was supposedly based on achievement. However, the expert witness for the plaintiff testified that the distinction between achievement grouping and ability grouping is an illusory one since it is impossible to measure raw ability.[67] After analyzing the data submitted by expert witnesses, the court determined that black students had not been placed fairly. The court further stated that there was no basis . . . "for concluding that achievement grouping as practiced in Tattnall County has obvious benefits."[68]

The characteristics of the CAT were studied and the court determined that the test itself was an acceptable instrument when used for the purposes for which it was constructed. Plaintiffs objected to the use of CAT in Tattnall County on several bases: failure to use the standard error of measurement in determining a cut-off score, lack of local validation of the test, bias of the test, the lack of curriculum correspondence, misgrading of the tests, and reliability of the tests. The court took very little stock in these arguments.

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[63] Brady v. Turlington, 372 So. 2d 1164 (Fla. Dist. Ct. App. 1979).

[64] Florida State Bd. of Educ. v. Brady, 368 So. 2d 661 (Fla. Dist. Ct. App. 1979).

[65] Wells v. Banks, 266 S.E.2d 220 (Ga. Ct. App. 1981).

[66] Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981).

[67] *Id.* at 480.

[68] *Id.* at 485.

Several teachers and administrators testified that the diploma policy was having a desirable effect in the school system. One of the plaintiff's expert witnesses testified that educational progress was being made, and the court concluded that "the policy is producing some educational benefits in Tattnall County."[69]

A portion of the case at bar included the awarding of certificates to EMR students rather than diplomas. The state board of education recommended that EMR students be given a diploma, and the Tattnall County School District has agreed to give diplomas to EMR students who achieve the 9.0 score on the reading and math section of the CAT.

The court ruled that the diploma policy, per se, did not violate the fourteenth amendment on the basis of racial discrimination. However, considering the past de jure history of a segregated system, and an unfair tracking system which perpetuated it, the discriminatory impact of the policy did violate the plaintiff's constitutional rights. The diploma policy cannot be constitutionally imposed on those who attended classes in the dual system.

The court ruled that the tracking system used until 1981 could not pass constitutional muster. In effect, certain aspects of the de jure segregation practiced in the dual system were perpetuated by the tracking system. Thus the court ruled that the diploma sanction must be suspended until 1983. However, the court observed that not all students in Tattnall County were subject to tracking practices and that disparities between black and white pupil achievement are narrowing. Hence, the county ruled that the diploma sanction could be reinstated in 1983, provided the school district could show "that the increased educational opportunities outweigh any lingering causal connection between the discriminatory tracking system and the imposition of the diploma sanction.[70]

Relying heavily on *Debra P. v. Turlington,* the court declared "that where the award of a diploma depends on the outcome of a test, the burden is on the school authorities to show that the test covered only material actually taught."[71]

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69. *Id.* at 494.
70. *Id.* at 503.
71. *Id.* at 509.

The issue of denying properly classified handicapped students a diploma was addressed by the court. Essentially, the court said that it was faced with an argument that an educational institution has no right to define its standards. The court rejected this argument saying, "[W]hile school authorities are free to award regular diplomas to any student, no matter what level of achievement reached, the Court concludes that section 504 (Rehabilitation Act of 1973) does not require such action."[72] Classifying students as EMR students when they were not such students constituted a violation of section 504 of the Rehabilitation Act of 1973, and the court ordered corrective action be taken. The court held that the misclassification was not intentional, nor did the diploma policy create a quasi-suspect class. For these reasons, the court declared that the equal protection rights of the handicapped had not been violated.

Two handicapped students in New York were awarded diplomas after completion of their Individual Educational Programs. The commissioner of education issued a letter which informed the students that the diplomas were invalid because recipients had not successfully passed the competency examinations. The examinations required proficiency in reading or English and mathematics. Plaintiffs brought suit claiming the action of the commissioner's office violated state statutes, section 504 of the Rehabilitation Act of 1973, the Education For All Handicapped Act of 1974, as well as the equal protection and due process guarantees of the fourteenth amendment.[73]

he court ruled that the state has a legitimate interest in attempting to insure the value of a diploma and the use of competency testing to achieve this interest is within the discretionary powers of the commissioner. The court was not convinced that denial of diplomas based on failure to meet testing requirements would violate section 504. The court further reasoned that the award of a diploma was not a necessary part of a "free appropriate education," thus the denial of the diploma did not violate the Education For All Handicapped Act.[74]

The court determined that the plaintiffs had property rights in their expectation of the diploma and a liberty right in their freedom to pursue employment opportunities and to be free from the stigmatizing effect of diploma denial. The court did not decide the case on the basis of whether or not the tests used were valid with respect to handicapped children. The case was decided on the basis that plaintiffs did not receive timely notice of the diploma sanction. The court added that "The court is not compelled nor is it deemed provident at this juncture to set a specific time period which would be adequate."[75] The scope of the decision is indicated by wording of the order as it stated, "[T]he diploma requirement . . . is improper as to the individual petitioners Abby and Richard."[76]

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[72] *Id.* at 511.

[73] Board of Educ. v. Ambach, 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).

[74] *Id.* at 570.

Peoria School District No. 150 in Illinois developed a Minimum Competency Test (MCT) requiring passing of examinations in "minimal" reading, language arts and mathematics as a graduation requirement. The requirement was first imposed on the 1980 graduating class. Students are permitted five attempts to pass the tests. Eleven students who had learning disabilities and/or other handicaps failed parts of the test one or more times and were awarded Certificates of Program Completion rather than regular diplomas. The state superintendent of education ordered the Peoria school board officials to award the usual diploma because of failure of the board to give adequate and timely notice.

Litigation resulted with the various participants requesting the court to direct certain action.[77] Plaintiffs requested (1) they receive regular diplomas; (2) appropriate modifications of the MCT for handicapped children; (3) Peoria School District No. 150 be directed to cease using the MCT unless it was appropriately modified for handicapped children; and (4) the state superintendent be directed to find the MCT invalid. The state superintendent requested that his administrative order be upheld and that the school district be ordered to implement it. School District No. 150 requested (1) that the validity of the MCT program be upheld as valid; (2) that two named students be permitted to retake the exam with requested modifications; and (3) the order for issuance of diplomas to certain plaintiffs be reversed.

The court ruled the school's minimum competency test requirement for a diploma was reasonable, the test did not have to be modified to take into account lack of mental ability or capacity, and that state superintendent's order issuing diplomas to eleven students had to be reversed. Several aspects of the decision are interesting. The court rejected plaintiff's claim that the test was scientifically invalid. Noting that no test of human beings by human beings can always be scientifically exact, the court continued,

> It is a reasonable test of the accomplishments of the school system in imparting basic knowledge to all its students, and

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[75] *Id.* at 575.
[76] *Id.*
[77] Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (C.D. Ill. 1982).

> unless some such measure is permitted, no certification of graduation from an educational program can have any meaning whatsoever. . . .[78]

The court also rejected plaintiff's request to modify the test to accommodate handicapping conditions. The court stated it was unreasonable to believe that

> [o]ne can discover the knowledge or degree of learning of a mentally impaired student by modifying the test to avoid contact with the mental deficiency. To do so would simply be to pretend that the deficiency did not exist, and to fail completely to measure the learning. A diploma issued as a result of passing such a modified test would be a perversion of the program to lend meaning to the diploma as a record of educational achievement.[79]

In dealing with the matter of timely notice, this court decided differently than those in Florida and New York. The court observed that plaintiffs and parents were aware of diploma requirements at least a year in advance. The state superintendent also testified that individual plaintiffs may have lacked exposure to as much as 90 percent of the material covered in the MCT. However, the court noted that the reason for such lack of exposure was the nature of individual educational plans for students concerned which made such exposure inappropriate. Continuing, the court states:

> [B]ecause of a diagnosed mental condition making it impossible or detrimental for a certain boy to wrestle with basic arithmetic, that subject matter is left out . . . in an effort to give him the benefit of as much of an enriching educational experience as will be worthwhile to him, and not clutter it with subject matter which would be harmful or simply worthless to him.[80]

Under such conditions, it is a fallacy to extend the period of notice or, absent such notice over a period of years, to award the same diploma as all other persons who are proficient in the subject. The court made a distinction in this case where testing conditions make it impossible to disclose the degree of learning that was actually possessed.

Considering the property and liberty interests, the court took note that the federal constitution prohibits violation of due process guarantees regardless of whether the student has any handicapping

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78. *Id.* at 728.
79. *Id.*
80. *Id.* at 730.

condition or ***has no handicapping condition*** (court's emphasis). The fact that some stigma may be attached to failure to achieve a high school diploma

> has nothing whatsoever to do with the legitimacy of a minimal competency test that is reasonably designed to test for a basic level of learning which a school district wishes to make certain it imparts to all those who receive its diploma. The means to avoid such stigma exists in attainment of the necessary knowledge. If capacity for such does not exist, the law does not require pretense to the contrary.[81]

EDUCATIONAL MALPRACTICE

We live in a society plagued by law suits. Malpractice suits against educators are no longer surprising. They are a natural adjunct to the accountability movement, and as the latter becomes more popular, malpractice suits will become more frequent.

In a number of these suits, students who have graduated from an institution hold that institution responsible for their intellectual inadequacies. Also involved are cases arising from alleged negligence in dealing with handicapped students. A number of legal issues are raised by these malpractice suits. First, the question must be answered if the professional educator is immune from liability. Second, it must be determined if educators owe a legal duty of care to students upon which to base a negligence action. Third, it must be decided if the failure to exercise a duty of care was the proximate cause of the injury.

The first malpractice suit against the public schools occurred in 1976.[82] After graduation from high school, Peter W. brought action against a San Francisco school district, claiming negligence and intentional misrepresentation which deprived him of basic academic skills. He alleged he was able to read at only the fifth grade level when he graduated. The court decided in favor of the school district since the alleged injuries could not be decided within the existing judicial system. The court said:

> [C]lassroom methodology affords no readily acceptable standards of care, or cause, of injury. The science of pedagogy is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own empathetic views on the subject.[83]

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[81] *Id.* at 730-31.

[82] Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

[83] *Id.* at 860-61.

The court ruled that the alleged injury could not be blamed on the school since:

> [T]he achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental. They may be present but not perceived, recognized but not identified.[84]

The court also made a statement that a decision in favor of the plaintiff would result in a deluge of these malpractice suits. Thus, in reaching the decision in the case at hand, the court considered this very practical matter.

A second notable malpractice suit surfaced in 1978.[85] Edward Donahue brought action against a New York school district to recover $5,000,000 damages for his academic deficiencies. He claimed he was permitted to graduate although he had failed several subjects and lacked basic reading and writing skills. The court ruled in favor of the school district, stating that, "The courts are an inappropriate forum to test the efficiency of educational programs and pedagogical methods."[86] The court pointed out that schools are faced with scarce resources, and the schools, not the courts, should decide how to best utilize these resources. Otherwise, the courts would be in the position of administering the schools. The court also indicated that the plaintiff's report cards were adequate notice that he was not achieving at a satisfactory level.

While the decisions in the first two cases described favored the defendant school districts, one should not conclude that such a decision will be rendered in all cases. The *Hoffman* case in New York is a case in point.[87] Daniel Hoffman, at the age of five, was tested and received an IQ score of 74. Daniel had a speech defect which may have caused his test score to be lower than normal. Since 75 was the cut-off score, Daniel was placed in a special education class.

The doctor who administered the test recommended that the boy be retested within a two-year period since a previous non-verbal intelligence test had resulted in an IQ score of 94. For some reason the school failed to retest Daniel until he was in the eleventh year of school. On this test Daniel scored 94, and school officials planned to drop him from the special education class since he was not retarded.

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84. *Id.* at 861.

85. Donahue v. Copiague Union Free School Dist., 407 N.Y.S.2d 874 (N.Y. 1978).

86. *Id.* at 879.

87. Hoffman v. Board of Educ. of City of New York, 410 N.Y.S.2d 99 (N.Y. App. Div. 1978).

The court case alleging educational malpractice was filed in 1977. The school district claimed that Daniel was "re-evaluated" annually. The jury found the school district had acted negligently and awarded Hoffman $750,000.[88] The school district appealed that case and the Appellant Division sustained the lower court's decision. However, damages were reduced to $500,000.[89]

The New York Court of Appeals reversed the decision. Relying on their previous decision in *Donahue*, the court restated its position that the courts will intervene in administration of public schools only in cases where gross violations of public policy are evident. The court concluded that clearly, no such circumstances were present in the case at hand.[90]

The final disposition of this case was similar to other malpractice suits. However, the courts were far from unanimous in their decisions as the New York Supreme Court, Appellant Division, split 3-2 while the court of appeals was divided 4-3. The dissenting opinions in both instances are quite instructive in pointing up the various issues at hand.

A malpractice suit with a slightly different twist was tried in California.[91] A seventeen-year-old boy filed suit against a county social services agency for negligently or intentionally failing to bring about his adoption. The Hayward Unified School District was also named in the suit for negligently placing the plaintiff in classes for the mentally retarded. The court relied heavily on the *Peter W.* decision in determining that the plaintiff had no cause for action.

The Supreme Court of Alaska recently turned away another claim for damages resulting from educational malpractice.[92] Two male students alleged the negligent acts and omissions of the school district in providing for their handicap of dyslexia caused loss of education, loss of opportunity for employment, loss of opportunity to attend college, past and future mental anguish, and loss of income and income earning ability.

The court rejected the claim for damages and suggested the parents seek prompt administrative remedies for what they believe to be erroneous classification or placement. The court stated, "Money damages . . . are a poor, and only tenuously related, substitute for a proper education."[93]

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[88] *Id.*

[89] *Id.* at 111.

[90] Hoffman v. Board of Educ. of City of New York, 424 N.Y.S.2d 376 (N.Y. 1979).

[91] Smith v. Alameda Cty. Soc. Servs. Agency, 153 Cal. Rptr. 712 (Cal. Ct. App. 1979).

[92] D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554 (Alaska 1981).

[93] *Id.* at 557.

Maryland courts rejected the concept of educational malpractice in 1981. The parents of a boy sixteen years of age charged school officials, a principal, a teacher, and a person who conducted diagnostic tests with certain acts of malpractice. Defendants were charged with negligently evaluating the boy, causing him to repeat first grade material even though he was physically in the second grade. The alleged misplacement continued throughout grade school, thereby causing the student embarrassment, learning deficiencies, and depletion of ego strengths. Plaintiff further alleged individual educators maliciously and intentionally committed such unlawful acts as (1) furnishing parents with false information as to their son's learning disabilities, (2) altering school records to cover up their actions, and (3) demeaning the child.

The Montgomery County Circuit Court ruled that public policy barred the action and sustained demurrer without leave to amend. This action was affirmed by the Court of Special Appeals of Maryland.[94] Relying on educational malpractice decisions of New York and California, the Maryland Court of Appeals gave little comfort to the plaintiffs.[95] The court pointed out that one of the problems in awarding damages in these matters is

> the absence of a workable rule of care against which the defendant's conduct may be measured, the inherent uncertainty in determining the cause and nature of any damages, and the extreme burden which would be imposed on the already strained resources of the public school system. . . .[96]

While the court affirmed the lower court decision relating to educational malpractice, it took a different view toward intentional torts against school children. In declining to protect individual educators from liability for intentional torts, the court stated:

> It is our view that where an individual engaged in the educational process is shown to have willfully and maliciously injured a child entrusted to his educational care, such outrageous conduct greatly outweighs any public policy consideration which would otherwise preclude liability so as to authorize recovery.[97]

Thus the court remanded the intentional tort matters back to the lower court for further action. Judge Davidson dissented, saying that in his view individuals engaged in the educational process should be held liable for negligent injury to a child entrusted to their care.

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[94] Hunter v. Board of Educ. of Montgomery Cty., 425 A.2d 681 (Md. Ct. Spec. App. 1981).

[95] *Id.* at 582.

[96] *Id.* at 584.

[97] *Id.* at 587.

Florida is the latest state to deal with the issue of educational malpractice. Plaintiffs alleged the student had been mistested and misclassified resulting in student's placement in an inappropriate special education program for a number of years to his detriment. The court held plaintiff failed to state a cause of action.[98]

CONCLUSION

School officials and administrators should not be reluctant to establish rules and regulations for the operation of schools in fear of court decisions. Neither should state officials and legislators shirk their responsibilities in organizing for the education of the children of the various states. However, these agencies and individuals must observe the constitutional rights of individuals and the statutory and administrative law to which they are subject. It is the neglect of these duties that will cause the courts to become involved in the administration of the schools.

This discussion has pointed out that the courts have not said the use of standardized tests are unlawful; they have said use of such tests are unlawful when unlawful results accrue, *e.g.*, perpetration of segregated classrooms. The courts have not ruled out the use of minimum competency tests or exit examinations as a requirement for graduation; they have ruled that such measures may not be used when inadequate notice was given or when disparate impact results. The courts have not consistently ruled that reduction of grades violates the invididual rights of students; however, they have done so when such action is in conflict with state statutes.

The rights of the invididual are not always supreme. The rights may be sacrificed in favor of public interest. The burden of proving such a public interest exists rests with school officials. This principle was illustrated by cases involving the Family Educational Rights and Privacy Act.

To date, courts have not been persuaded that awards of damages for educational malpractice is in the best interest of public policy. However, this observer is not convinced the matter is a settled issue. The split decisions in *Hoffman* and the dissent in *Hunter* is indicative of a possible shift in attitude of the courts. Further, the fine line in *Hunter* in holding individual educators liable for intentional torts is but a step away from holding boards of education accountable for their efforts to educate.

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[98] Tubell v. Dade Cty. Pub. Schools, No. 81-2309 (Fla. Dist. Ct. App. 1982).

Finally, remembering the judge's declaration in *Hobson*,[99] one cannot help but be impressed with the importance of the teacher in evaluating the progress of pupils throughout their educational careers. In view of the decision in *Hunter* which held teachers may be liable for intentional torts, the question may well be asked, "Will teachers be willing to assume such a responsible task?"

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[99] *See* Hobson v. Hansen, *supra* at note 27.

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School Crime Prevention: NOLPE's Role

ROBERT J. RUBEL

Dr. Rubel received his Ph.D. from the University of Wisconsin at Madison and wrote his dissertation on "Trends in Disorders, Disruptions, and Crimes in Public Secondary Schools: 1950-1975." He has been busy researching and practicing in this field as an expert and advisor. Dr. Rubel is presently Director of National Alliance for Safe Schools in Austin, Texas.

INTRODUCTION

What is the Problem?

Crime and the fear of crime are facts of life in America's schools. Teachers and students avoid certain parts of the school out of fear for their personal safety. Further, crime and the fear resulting from it detract from the safe and positive environment of the school; they directly affect the quality of education available to students.

Crime is also costly. In a recently released study, *A Report on Crime and Effective Anti-Crime Programs in California Public Schools* put out by the California Department of Education, reporting school districts stated that they spent almost $86.5 million in efforts to prevent and control violence in their educational institutions. The Los Angles Unified School District alone spends $12 million, and New York City's school system spends $30 million annually on safety and security operations.

Educational problems resulting from severely disruptive students are not limited to urban schools. Though the intensity and frequency of such acts is greater in large schools located in urban areas than in smaller schools located in rural regions, where school districts often do not have a security office. Nevertheless, for those smaller schools unaccustomed to aggressive or criminal acts, the breakdown of the quality of education can come quite quickly.

As the fear of crime increases in a school, staff morale invariably suffers. Both the teaching and administrative staff who experience crime and the fear of crime in their workplace find it increasingly difficult to generate quality performance and enthusiasm on the job. Crime in the schools, understandably, takes its toll, a toll that frequently surpasses what would be expected by someone merely looking at the absolute numbers of offenses in a school.

Schools experiencing crimes—especially fear-inducing crimes—are not serving the best interests of students, their parents, or the community at large. Although the obligation of school officials to ensure safe and positive environments requires that they constantly engage in actions to improve the efficiency and effectiveness of their schools on many fronts, the same can be said of elected officials and law enforcement personnel, all of whom have a vested interest in ensuring accountability to the public whose children they are educating in their communities.

What is Known About Victimization in Schools?

There are two kinds of victimization. The first kind arises from actual contact with someone or some event. Someone is robbed. Someone's personal property is destroyed. The second kind of victimization arises from fear—from the personal assessment that local conditions are not under control and that, as Nathan Glazer has observed, "anyone can invade it to do what ever damage and mischief the mind suggests."

In that first category—actual victimizations—the accuracy of the data are widely divergent between studies, and many of the findings are hotly contested. The most cited research into student victimization is HEW's *Safe School Study*, released in 1978. There, we see that about 1.3 percent of all secondary students report being assaulted in a typical month at school, 0.5 percent report being robbed, and 11 percent report theft. In extrapolated terms, these figures represent reports of 282,000 attacks, 112,000 robberies, and 2,300,000 thefts by youth in grades 7-12 in our public schools. It is useful to remember that at the same time these data were released, LEAA's National Crime Survey showed that fully 68 percent of all robberies and 50 percent of all attacks experienced by 12-15 year-olds occurred in schools where these same adolescents spend only 25 percent of their waking hours.

In the second category—victimization arising from fear—one need only put oneself in the shoes of an inner-city school student to imagine what some of the experiences must be like. The student walks down a corridor that is noisy with boistrous classmates, she passes little cliques of students who are being secretive, but that is no surprise to her, for she knows that two of them are drug dealers. As she nears a side-exit from the building, she realizes that a friend of hers, about 20 feet away, appears to be giving money to an older classmate whom with other roughlooking cohorts, is lounging by the door. She turns and enters her class, but little haven is found, for some of those that arrived before her are jostling and "playing" in the back of the room. The teacher, rather than putting the lesson on the board, is imploring these students to take their seats. Finally they do. The class is one-fifth over. The teacher still must take roll and put the lessons on the board.

Has this student been the direct victim of a crime? No. Has the student been victimized by general disquiet, including criminal enterprise operating within her school? Assuredly.

What Do We Know About Crime Levels and Fear Levels?

A topic very seldom discussed and, in the opinion of this author, of singular importance, is the impact of different types of crimes on a student's perception that he is in some danger. For example, research seems to bear out that it is usually crimes that appear to a pupil to personally affect him that are fear-inducing. This means, as a hypothetical example, that a school with an exemplary record of school spirit and orderliness can suffer a single but costly act of vandalism—such as the breaking one weekend of many school windows—without the student body taking much notice. "Some crazy kid did it," one might hear. No normal child would take a look at the destroyed property and burst into tears over the loss. The same will be true of acts of burglary and theft of school property. These simply are *not* student concerns. Certainly, it is possible to extrapolate the loss of the property into the loss of educational opportunities. Certainly it is possible to say that the student body has been "victimized" in the long run through loss of dollars that are available for the academic curriculum, but these are problems not generally considered by the students.

In this same hypothetical school, the one with the exemplary record, if the incident that is at issue is a single, ugly sex offense or a single violent and bloody assault, the composure of the student body is likely to change dramatically. Rumors will fly. Classes will be disrupted. Parents will call. The district office will want to know all the little details because the press is going to run a story on it. The reputation of that school is quite likely to be tainted for years to come.

Taking this point somewhat further, research shows that some schools can tolerate a substantial amount of criminal activity without any particular fear on the part of students. By staff, yes, but not by students. This will occur when students reach an informal concensus that the administrators, and some teachers, are unfair, prejudiced, nasty, and the like, and that the correct and united course to take is that of destroying the school, of forcing some undefined change. These schools are quite common. They can be identified upon entering them. Loud noise, certainly, but lots of graffiti bearing messages against the school. Broken windows. Damaged doors. Destroyed property. High teacher absence rates. Substitutes unwilling to come to the school. Administrators staying in their offices. Seige. Students in control.

And the opposite case is also true. Schools can appear relatively quiet, and the students will be fearful. In such cases, data from the *Safe School Study* are instructive, for they show the wide disparity between reported crime and the fear it seems to generate. For example, while only 1.3 percent of all secondary school students are attacked, and only 0.5 percent are robbed, fully 22 percent (4.6 million youth in secondary schools) report avoiding some bathrooms in their schools out of fear, and 16 percent (3.4 million students) report avoiding three or more locations. Fully 20 percent (4.2 million students) report a general fear of being bothered while in school. In urban junior high schools—clearly the most distressed of our schools—8 percent of our nation's students in grades 7-12 reported actually staying home at least one day the previous month out of fear for their personal safety.

How Does This Information Concern NOLPE Members?

This understanding of the relative importance of some types of crimes (violent, personal) over others (property, against school) forces a new way of viewing the few students who commit violent personal acts, and the many students who suffer from their effects.

More than ever before, this understanding calls for schools to develop internal methods for analyzing the kinds of offenses taking place within their walls; for being able to separate, for example, "fights" (mutual participation) from "assaults" (a criminal category involving an unwilling victim); thefts of school property from thefts of personal property; vandalism against school property from vandalism of personal property. School officials must come to undertand that through such standard analyses specific problems will be discovered so that specific interventions can be developed. Order will be brought to the current chaos that surrounds the recognition and reporting of crimes in schools, and from that order will come power—the power to implement projects that *correctly* target specific disruptive and criminal acts and serve to reduce not only crime, but also the more invidious fear of crime.

NOLPE members, working within school districts, can spearhead efforts within their school administration to address areas that ultimately have a great deal to do with the legal problems of education.

WHAT *USUALLY* CONCERNS NOLPE MEMBERS, AND WHAT *SHOULD* CONCERN US?

Usual Concerns Are Primarily Directly Related to Law and Occur After-The-Fact

Although the author of this chapter is not an attorney, he has worked with NOLPE members for almost a decade. From these contacts he has formed the impression that school board attorneys are primarily concerned with presenting the school's position when a court suit is threatened or is pending. In that regard, some NOLPE members doubtless help develop their school district's policies concerning such issues as search and seizure; chain of custody; civil rights liability; and tort liability. These four topics appear repeatedly in the literature, and they form the nucleus of the section on legal issues concerning crime prevention in public schools written by NOLPE's current President, Ralph Stern, for a document entitled *A Policy Brief: Reducing Crime in Schools* prepared for the National Institute of Justice. Although these are all critical areas of concern, and policies and procedures surely need to be developed for every one, readers are already sufficiently familiar with these issues and their supporting case law to permit sidestepping further discussion at this time.

Here, Issues Are Raised that Involve the Development of New Policies

Even though the responsibilities of school board attorneys revolve around concerns of actual or potential liability, the author proposes adding four new areas to that burden. These are all issues that—at least to some extent—require the attention of NOLPE members as they consider the best ways to prevent their school districts from becoming entangled in some of the more troubling legal problems of education. These four areas are: conceptually separating crimes from disciplinary infractions; promoting a crime analysis approach district-wide; developing procedures for school contacts with police and courts; and implementing systems that help ease the transition of detained or incarcerated youth back to the school system.

The Importance of Separating Crimes from Disciplinary Infractions

Governments make laws; organizations make rules. Governments enforce laws; organizations enforce their own rules. Frequently school officials fail to clearly differentiate between violations of rules and violations of laws, a situation that often leads school personnel to try to deal administratively with students who have actually violated federal, state, or local laws. As a matter of practical necessity, school personnel *must* be prepared to censure certain common offenses, even some that are, technically, crimes. Surely it would be an overreaction by school officials to refer youth to police for stealing an inexpensive pen or notebook—unless the student frequently repeats similar acts after having been warned about the gravity of the offense and the consequences of continuing such behavior. Conversely, it would be inappropriate for school personnel *not* to refer to police cases of serious violations, such as assaults, weapons possession, and drug use or sale.

NOLPE members could make a solid contribution to the clarity of thought—leading to the clarity of action by local school personnel—by helping their districts develop and disseminate definitions of acts considered by the school to be disciplinary violations versus criminal acts.

The Importance of Developing a Crime Analysis System

Once criminal offenses have been separated from non-criminal infractions of school rules, it is at last possible to establish a crime analysis system. Such systems, long known to law enforcement professionals, are based on the assumption that the more one knows about the nature, extent, and characteristics of each type of crime occurring in a location, the more successful intervention techniques will be in preventing further occurrences. In schools, where court suits can be anticipated from parents alleging that school personnel have not taken reasonable and prudent steps to safeguard their children, a crime analysis system can become quite important. In an effort to spare readers the details of such a process, only an overview is presented here. Readers are encouraged to contact the author for more information.

In brief, crime analysis in schools consists of clearly defining criminal acts (discussed previously), developing sub-categories for each category of offense (*e.g.*, category—assaults; subcategories—against students, against teachers, against security, against others) developing a data collection form (information about what happened, when it happened, where it happened, characteristics of victims and offenders, etc.), collecting the information, analyzing the data, and, finally, developing interventions based on the findings.

NOLPE members could present this sort of package under the auspices of their offices, considering that such reasoned planning reflects an orderly way of conducting the "business of education," and that it further ensures that school officials at all levels are protected from charges that they are willfully neglecting the safety and security of their charges through inattention to acts of crime and violence in their schools.

The Importance of Developing Procedures for School Contacts with Police and Courts

Relationships are built on expectations. Relationships dissolve when expectations are not met. In many cities today, relationships between schools and police and schools and courts are tenuous, at best. In some cities, the relations are quite healthy. The determining factor appears to be the existence—or lack of existence— of understandings between these parties of the roles each is expected to play when handling youth charged with criminal conduct.

Police-school agreements should specify those definitions of crimes used by the local police, the frequency of meetings used to compare community and school crime information, the expectations of each of the parties concerning contact with juveniles in the school setting, the seriousness of offenses for which police do and do not wish to be contacted, and the actions police will take in cooperation with the school system even if the local courts will not agree to hear the cases.

Court-school agreements should include statements about the procedures of the court that should be known in advance to education personnel who will be testifying. Situations that are likely to be trying for witnesses should be specified; situations such as delays, rescheduling problems, demeanor, and stalling practices. For the school's part, officials should determine when and under what conditions attendance records will be made available to the court, how probation officers will be received by school officials, how court liaison officers will work with both groups, etc.

As these agreements will, to greater or lesser extents, take the form of memoranda, NOLPE members working in school districts could play a key role not only in promoting the development of these documents, but in mediating between the parties in order to ensure appropriate and thorough documents.

The Importance of Implementing Systems that Help Ease the Transition of Detained or Incarcerated Youth Back to the School

Although perhaps furthest afield from the direct concern of NOLPE members, an area that nonetheless touches on legal concerns is that of ensuring the appropriate handling of youth returning from a temporary juvenile detention center or from a longer-term correctional facility. Here, the central issue becomes whether the school system is truly acting fairly in re-enrolling and counseling the youth. As there are constitutional guarantees to a public education, it is not inconceivable that a suit could be brought against a school district for denying that opportunity for an education through inappropriate and irresponsible handling of returning delinquents. Here, it could be posited, the school system is stigmatizing the youth and predestining him to social and academic frictions in the school. Future troubles, social or legal, could be blamed on the school.

NOLPE members, then, could act within their school districts to anticipate such problems and to help their districts devise policies and programs particularly designed to prevent such charges.

CONCLUSION

Members of the National Organization on Legal Problems of Education are in particulary sensitive positions when it comes to promoting changes within school districts that will actually make differences for large numbers of America's youth. By taking active stands to help separate criminal from non-criminal acts in the minds of education personnel; by promoting a reasoned crime analysis program; by helping to develop memoranda of understanding between schools and police, and schools and courts; and by helping to develop re-entry procedures for adjudicated youth; tremendously positive, long-term improvements can be made in the business of education.

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Extracurricular Activities: Legal Developments

JOHN L. STROPE, JR.

Dr. Strope is Assistant Professor at the University of South Alabama-Mobile in the Department of Educational Leadership and Foundations where he teaches school law at the graduate level as well as an undergraduate course in law and politics where he created an outline and materials for the course. He received his Doctor of Philosophy and Juris Doctor from the University of Nebraska. Dr. Strope has had teaching and administrative experiences at the middle and high school levels. He professionally has acted as director, coordinator, presenter and participant at many seminars and conferences. He is actively engaged in the writing and researching of school law.

On numerous occasions over the years, federal and state courts have restated the general rule that local school officials and state athletic and activity associations have vast discretion over extracurricular activities. This chapter will explore legal developments that impact upon that general rule by focusing on reported cases beginning in 1980.

GENERAL TRANSFER RULES

Most state athletic associations have a transfer rule that renders a student ineligible for a stated period of time (semester or school year) upon transfer from one high school to another. Associations mitigate the impact of the rule by not applying the penalty when the student moved because the parents have moved. Many states allow requests for hardship exceptions where the student is involuntarily denied the opportunity to remain living with the parents. These transfer rules are intended to prevent recruiting of student athletes.

Courts have found no property rights involved so federal claims to due process of law are to no avail and a challenge based on burdening, rather than denying, the right to interstate travel have been turned aside.[1] The ultimate support for these rules came recently from a Texas court which upheld a transfer rule barring competition in football or basketball for one year even though the parents themselves changed residence (from Vermont to Texas).[2] The rule was uniformly applied not only to interstate moves but to local intrastate moves as well. On appeal, the Supreme Court of Texas found the rule violated the equal protection clause because the rule, and its application, was not reasonably related to the goal of deterring recruitment.

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[1] Sullivan v. University Interscholastic League, 599 S.W.2d 860 (Tex. Civ. App. 1980), *aff'd in part, rev'd in part*, 616 S.W.2d 170 (Tex. 1981); United States *ex rel.* Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982).

TRANSFERS AND PRIVATE SCHOOLS

Some of the most complicated and seemingly unfair applications of transfer rules have involved ineligibility and attendance at private schools. Although freedom of religion seems burdened by these transfer rules, courts have unanimousy supported the rules and their application.[3] A Louisiana high school athletic assocation rule affected every student who attended the only Lutheran high school in the New Orleans metropolitan area.[4] The attendance districts of private schools were determined by the boundaries of the local public high school in which that private school was physically located. Because no Lutheran elementary or junior high schools were located within the boundaries of the Lutheran high school district, all students who enrolled were treated as transfers under the rule and were ineligible for one year. Due to the effect on religion being indirect and the lack of an equally effective and workable alternative, the rule as applied was upheld.

INELIGIBILITY BASED ON NON-SCHOOL INCIDENTS

Athletic associations maintain rules which limit if not completely prohibit participation in a sport outside the school setting during the course of that particular interscholastic sport. Consistently with other cases where courts did not find federally protected property interests that are protected by due process of law, athletic associations demonstrate judicially-accepted rational bases for this rule by emphasizing the need to protect student health, avoiding interference with school work, maintaining a concern for the whole team, and protecting interscholastic competition from exploitation by those sponsoring the outside events. Once again, courts did not consider the fairness of the application of the rule upon individuals but rather considered the rule in the abstract. Plaintiffs lost when they definitely had no notice of these rules as well as when they had notice.[5]

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[2] *Id.* Sullivan, note 1.

[3] Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 449 (W.D. Mo. 1980), *aff'd* 682 F.2d 147 (8th Cir. 1982); Genusa v. Holy Cross College, Inc., 389 So. 2d 908 (La. Ct. App. 1980); Cooper v. Oregon School Activities Ass'n, 629 P.2d 386 (Or. Ct. App. 1981); *See generally*, ABC League v. Missouri State High School Activities Ass'n, 530 F. Supp. 1033 (E.D. Mo. 1982), *aff'd* 682 F.2d 147 (8th Cir. 1982).

[4] Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980).

Athletes have also challenged rules which prohibited or limited outside athletic participation outside the season and outside the school year itself.[6] Again, courts have found no federal constitutional rights, and the associations have demonstrated a rational basis for such rules. The associations have argued the rule is intended to control overzealous coaches and parents, protect student athletes from undue pressure, prevent the wealthy from enjoying special benefits, avoid the use of camps for recruiting purposes, prevent conflicts in approaches between school coaches and camp instructors, and assist student development by exposure to numerous sports at an early age.

TEAM AND SCHOOL PENALTIES

For using three academically ineligible players, one school was required to forfeit three football victories and thus be eliminated from state playoffs.[7] Where the penalties or rules operate too harshly, the courts tell the complaining parties to go back to the association and work to change the rules. Again no difference in outcome occurs even when many innocent individuals are penalized in the process of imposing the penalty.

A Louisiana case represents one example where a plaintiff's complaint about the application of a rule and subsequent penalty may prove successful.[8] Early in the 1978 school year, a teacher-coach in a Catholic high school went to a Catholic elementary school to speak about the scholastic and academic programs at his school. After conducting an investigation, the association found the school and coach in violation of an undue influence rule and imposed certain penalties upon the school. The coach's claim of a denial of his freedom of speech under the first amendment was dismissed by the trial judge without any trial. The coach claimed that the rule was vague as written and thus not reasonable or understandable. Additionally, he argued that his exercise of free speech was penalized by the association. On appeal the Court of Appeals for the Fifth Circuit reversed the decision of the lower court and remanded the case for trial to allow the plaintiffs to prove their alleged constitutional violation.

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[5] 5. Caso v. New York State Pub. High School Athletic Ass'n, 434 N.Y.S.2d 60 (N.Y. App. Div. 1980).

[6] 6. Kite v. Marshall, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982).

[7] 7. Adamek v. Pennsylvania Interscholastic Athletic Ass'n, 426 A.2d 1206 (Pa. Commw. Ct. 1981).

[8] 8. Holy Cross College v. Louisiana High School Athletic Ass'n, 632 F.2d 1287 (5th Cir. 1980).

PARTICIPATION BY HANDICAPPED ATHLETES

One of the new problems facing administrators of athletic programs during the 1970's involved the participation of handicapped athletes. The number of reported cases on this subject is relatively small, so broad generalizations are both difficult and uncertain. Passage of the Rehabilitation Act of 1973, which includes the provision popularly-referred to as section 504, has not made resolution of these issues any simpler.[9]

A recent New York case illustrates the impact of section 504.[10] The student had such serious, congenital physical handicaps that a full-time aide and special transportation and movement provisions were necessary to provide her with an education during the regular school day. In considering the plaintiff's request to participate in a school-sponsored trip to Spain, the board determined that the student would have to have an aide to accompany her to deal with the physical handicaps. When the family expressed an unwillingness to provide such aide, the board refused the student's request to participate. Apparently the federal court as indicating that while section 504 might create demands for the regular school program, it did not necessarily place similar burdens upon the school system for all school-related activities or for portions of a particular activity. Also, it is instructive to recognize that the court easily dealt with the question of whether this was a program or activity receiving federal financial assistance. The court simply concluded that even though the students were paying a substantial portion of the cost of the trip, the school district which had planned and sponsored the program was a general recipient of federal financial aid, although none was directed explicitly toward this activity.

A controversy in Texas caused a federal court to determine that section 504 must take precedence over the application of a typical athletic association transfer association transfer rule. Because he was suffering severe psychiatric difficulties, the court concluded that the student was handicapped within the meaning of the statute. Living with his grandparents (even though his parents were living in another Texas community) and participating in interscholastic football represented a reasonable way to serve the needs of this handicapped child. To prevent his being discriminated against because of his handicap, the court granted a request for a preliminary injunction. No trial was ever held. However, the case became more significant because of a recent decision by the Fifth Circuit Court of Appeals following an appeal by the athletic association.[11] The question of attorney fees faced the appellate court. Did the federal statute permitting the award of attorney fees in cases involving deprivation of civil rights apply to section 504 cases? The court concluded that attorney fees were possible and remanded the case to the district court for determination of the amount of attorney fees. Although the student had graduated, the athletic association was left with the spectre of paying several thousand dollars in attorney fees for having originally refused to allow the student to participate. At that time, the Texas University Interscholastic League had no provisions to consider hardship exceptions to the general transfer rule; such process might have eliminated the need to lose such a case in court.

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[9] 29 U.S.C. § 794.

[10] Wolff v. South Colonie Cent. School Dist., 534 F. Supp. 758 (N.D.N.Y. 1982).

INELIGIBILITY BASED ON AGE OR LENGTH OF ATTENDANCE

Most athletic associations have rules prohibiting nineteen-year-olds from participation or limiting participation to four years or eight semesters of continuous attendance after starting ninth grade. These rules are intended to assure fair competition, protect the younger and less mature athletes from older athletes, prevent academic decisions from being made for athletic purposes, and avoid rewarding academic failure.[12]

MISCELLANEOUS CASES

The cases discussed in this section are generally unrelated to each other although the first cases do relate to freedom of religion. A church school challenged a membership requirement of the Arkansas Activities Association as a burden on the free exercise of religion. To join the association, a school was required to satisfy accreditation standards of the Arkansas State Department of Education. The church school rejected any elements of state authority over the operation of the school and had no intentions of seeking state accreditation. The Court of Appeals for the Eighth Circuit upheld the rule.[13]

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[11] Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3495 (U.S. May 18, 1981).

[12] Blue v. University Interscholastic League, 503 F. Supp. 1030 (N.D. Tex. 1980); Duffley v. New Hampshire Interscholastic Athletic Ass'n, 446 A.2d 462 (N.H. 1981).

[13] Windsor Park Baptist Church v. Arkansas Act. Ass'n, 658 F.2d 618 (8th Cir. 1981).

A ban on wearing yarmulkes during basketball games was challenged by student-athletes of the Orthodox Jewish faith. Their religious beliefs required their heads be covered unless the students were unconscious, immersed in water, or in immediate danger of losing their life. For sometime these athletes had been allowed to wear the yarmulkes with no incidents of injury to any players. Model rules of the National Federation of State High School Associations were adopted by the Illinois association and included a ban on this apparel. Neither the national federation nor the state association had any evidences of even one instance of slippage or injury caused by the wearing of yarmulkes. In fact, the national federation had conducted a survey of coaches and found that they were overwhelmingly in favor (6 to 1) of retaining a previous rule which allowed the wearing of soft berets of which the yarmulkes were alike in all meaningful ways. The court determined that a fundamental right to the free exercise of one's religion was burdened by this rule and prohibited its enforcement. However, the court of appeals remanded the case to explore the safety questions further.[14]

Plaintiffs were successful with their judicial challenges in the following three cases. Illinois law provided a process for transferring real property from one school district to a neighboring school district with one basis for the transfer being for the educational welfare of the pupils involved.[15] The home system had no tennis team, and the athlete wanted to participate on such a team. The parents successfully followed the process of transferring their property to the neighboring system which had a tennis team. The Florida Activities Association had a rule which limited the number of players who could suit up for state football playoffs to forty-four players after having allowed an unlimited roster during the season.[16] Both the trial court and appellate court found the rule to be arbitrary and irrational. Many states have recently adopted open meeting laws to assure that the public can monitor the activities of public officials. A television news director was denied access to a committee meeting of the Louisiana High School Association. He successfully argued that for purposes of the open meeting law the association was a public body and its meetings must be open to the public.[17]

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14. Menora v. Illinois High School Ass'n, 527 F. Supp. 637 (N.D. Ill. 1981), *vacated* No. 81-2960 (7th Cir. June 1981).

15. Board of Educ. v. Regional Bd. of School Trustees, 405 N.E.2d 495 (Ill. App. Ct. 1980).

16. Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245 (Fla. Dist. Ct. App. 1982).

17. Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386 (La. 1981).

The last case repeats a common message—courts are generally staying out of the business of athletic associations. A Georgia football referee had admittedly assessed an incorrect penalty and adversely affected the playoff hopes of a high school football team. In reversing the trial court, the Supreme Court of Georgia said that plaintiffs had no constitutional rights involved and that state courts in Georgia had no authority to review the decisions of football referees.[18]

School and School-Related Organizations

The bulk of these cases arose over the last fifty years where state laws, board of education policies, and school rules were adopted to eliminate the morale and discipline problems caused by the existence of secret societies including fraternities and sororities at the secondary level. Today's generally established law is that the state may prohibit the existence of, or membership in, secret societies if it chooses to do so. Very few judicial challenges to these policies have occurred in the last twenty years.

Where constitutional rights are not obviously related to the decision or policy, the school boards are more likely to be judicially supported. An Ohio high school band was invited to participate in festivities connected with the Organge Bowl in Miami, Florida over Christmas vacation. Expenses were to be borne completely by a band booster club. Based on a board policy prohibiting "long, expensive, out-of-state trips," the board refused to give approval for the trip. Finding no constitutional right to participate in the activity and no evidence of lack of approval due to the exercise of some constitutional rights, the court dismissed the complaint of the plaintiffs without a trial.[19] Interestingly, the judge suggested in his closing remarks that he could see no reason why the band could not go without the board's approval because the board had given indications there would be no retaliation against anyone who went!

System and Building Rules and Student Eligibility

Buhlman v. Board of Education is illustrative of the belief that good administration makes good law.[20] In January of 1980, the Suffern High School hockey team went to Saratoga, New York for games on Friday and Saturday. Several parents accompanied the team and the coach.

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[18] Georgia High School Ass'n v. Waddell, 285 So. 2d 7 (Ga. 1981).

[19] Park Hills Music Club, Inc. v. Board of Educ., 512 F. Supp. 1040 (S.D. Ohio 1981).

[20] 436 N.Y.S.2d 192 (N.Y. Sup. Ct. 1981).

About eleven o'clock and again at midnight, bed check was conducted to ensure that team members had obeyed the instructions to remain in their rooms with their lights out. Sometime after midnight the coach heard a noise that led him to check on the team and led to his discovery that marijuana smoking and beer drinking were occurring.

The coach confronted each team member and each admitted, except one, that he had been drinking or smoking. During the evening, the coach continued to discuss the incident with the team captains and at least one parent. On Saturday he contacted the athletic director of the high school; it was decided to take up the matter again on Monday morning. Also, the coach informed the parents present about what had taken place the previous evening. The training rules and penalties were admittedly known by each of the athletes, and they had been read and explained by the coach to the athletes.

On Monday, the principal, the assistant principals, the athletic director, and the hockey coach devised a procedure to assure that they had the correct facts. Each boy was individually asked four questions: Did you smoke? Did you drink? Did you participate in providing the beer? Who should be exonerated? The same facts came out as surfaced on the early Saturday meeting of the coach and players.

The following day the principal notified each team member in writing that he would be suspended from the hockey team for six weeks based upon the rules and penalties that had previously been adopted. Soon thereafter several parents offered the principal some alternatives for his consideration. The principal indicated that he would consider them, but as the administrator, he had to make the decision. Ultimately, he stood with his original decision.

In a typical fourteenth amendment due process analysis, the court concluded that probably no protected property right was involved with participating in extracurricular activities. However, the court indicated it would consider what due process ought to be given in any event. Upon consideration, the court concluded if any due process had been constitutionally required it had surely been given by school officials. The coach's process was fair, and the principal's process was fair and appropriate to the circumstances.

Miscellaneous First Amendment Issues

Historically, the first amendment rights which in the educational context get the most judicial attention appear to be cyclical. In the early 1960's, freedom of religion was a great concern. By the late 1960's and early 1970's, freedom of speech and assembly were the bases for many legal challenges. In the early 1980's, freedom of religion has returned to the forefront.

In 1962-63 the United States Supreme Court ruled that the first amendment prohibited the Lord's Prayer and Bible reading in the public schools.[21] Since that time, innumerable efforts have been made by schools to avoid the full impact of those decisions. The consistent results of these cases, however, have been the continued prohibition of religious activities in public schools. Interestingly, with the 1980's came suits challenging school board policies or decisions to not allow religious activities rather than suits to stop such activities. A case arose over student requests to organize a voluntary prayer or Bible study group and be recognized as an official school activity.[22] Whether before, during, or after school, the group desired to hold voluntary meetings at the school with or without faculty supervision. The administrator and school board refused to grant permission or recognition. Arguments based on the free exercise of religion clause were unsuccessful as no evidence was offered to convince the court that students lacked other facilities or opportunities for exercising their religious beliefs. Additionally, the courts feared that in the school setting the existence of such clubs would pressure the less orthodox to conform or indicate a stamp of approval on such activities. While both courts concluded that the secular purpose of the activities—to encourage student participation—was acceptable under the first amendment, both courts concluded that the primary effect of advancing religion and the excessive entanglement with religion made the clubs unconstitutional.

Courts have identified some very narrow exceptions to this general prohibition on religious activities in the public schools. One court distinguished the ceremonial nature of the occasion from the occurrence of such religious activities as part of the regular school day where attendance would be required. Opening assemblies with a student-led prayer, conversely, violates both the free exercise and establishment clauses.[23]

Two very recent cases demonstrate how boards of education can face freedom of religion questions in very opposite ways. On several occasions during the 1970's the Lubbock Independent School District received complaints about religious activities of a Christian evangelical nature within the schools and as part of the schools' assemblies. Evidence presented in court indicated the board knowingly ignored its own 1971 unofficial policy on the subject, and in 1979 it adopted a policy to allow student-initiated activities which, in effect, was used to perpetuate the practices. Then, in 1980, a policy was adopted which allowed for voluntary meetings with adult supervision before and after school for educational, moral, religious, or ethical purposes. Contrast the delaying tactics in that case with the efforts of the board of education of Sioux Falls, South Dakota. A suit had been brought challenging the Christian religious nature of activities occurring during the Christmas season. The board formed a committee of citizens and educators to develop a policy consistent with law to guide student activities during days of religious celebration. In the former case, the board's intent to foster Christianity was obvious and the plaintiff's challenge was successful. In the latter case the challenge was unsuccessful and the board's efforts to resolve the problem fairly were praised by the court.[24]

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[21] Engel v. Vitale, 370 U.S. 421 (1962); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[22] Brandon v. Board of Educ., 635 F.2d 971 (2nd Cir. 1980), *cert. denied* 50 U.S.L.W. 3482 (U.S. Dec. 14, 1981).

[23] Collins v. Chandler Unified School Dist., 470 F. Supp. 959 (D. Ariz. 1979), *modified* 644 F.2d 759 (9th Cir. 1981).

A New Jersey school board adopted a policy which effectively prohibited all Friday evening, Saturday during-the-day, and Sunday morning student activities except interscholastic sports (control of scheduling these activities was not held by the board). The policy was designed to avoid causing students to choose between participating in school activities or participating in their own religious activities. The policy was also intended to assure equal opportunity to participate in these activities. Drama club members challenged the refusal to allow a Friday evening performance of a school play. A double cast had been chosen for the play to allow more participation. The court upheld the policy in the face of an establishment clause complaint because any advancement of religion was only incidental and the policy actually encouraged the exercise of religion free from government interference.[25]

A Maryland case raised slightly different religious questions.[26] Beginning with the 1980-81 school year, the Allegheny County Public School System limited participation in its county-wide music programs to full-time public school students. Previously, students in private schools had been allowed to participate in the program. These students went to court and claimed that government was burdening the free exercise of their religion by withdrawing participation privileges. In rejecting such claims the court determined that exercising the right to attend private schools necessarily reduced some of the rights to remain equally eligible for public school programs and this was no burden on the actual practice of religion.

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[24] Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980), *cert. denied* 449 U.S. 987 (1980).

[25] Student Members of the Playcrafters v. Board of Educ., 424 A.2d 1192 (N.J. Super. Ct. App. Div. 1981).

[26] Thomas v. Allegany Cty. Bd. of Educ., 443 A.2d 622 (Md. Ct. Spec. App. 1982).

The last two cases here, while completely unrelated to one another, raise freedom of speech claims. Several cast members challenged the superintendent's decision not to allow the spring play, *Pippin*, to be presented. Even after changes had been made in the script, the superintendent concluded there was too great an emphasis in the play on sexual activities. The court concluded dramatic speech was not of the same nature as protected political speech. Just as students had no right to select the content of a senior history course, they had no right to choose a particular play to be presented.[27] Such curriculum matters are left to educators and school boards. Further, the court was concerned that the school would be seen as approving such behavior if the play had been presented.

A senior boy obtained a preliminary injunction to take a male friend as his escort to the senior dinner-dance.[28] The principal denied his request because of a fear of some disruption or violence toward the students. However, because only one incident of previous disruption was offered as evidence, the court concluded that such undifferentiated fear or apprehension of disruption was not enough to justify denying the student's free speech right. This, the court found, was especially true because this was a voluntary, social event and would take place completely away from the school environment.

CONCLUSION

Cases with different facts and creative application of old legal arguments continue to be filed. However, the general view of courts remains to leave decisions to the vast discretion of schools and activity associations.

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[27] Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981), *aff'd* 688 F.2d 214 (3rd Cir. 1982).

[28] Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980).

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Conservative Pressures on Curriculum

JOSEPH E. BRYSON

Joseph E. Bryson is Professor of Education, University of North Carolina at Greensboro where he teaches school law, philosophy, and educational administration. He has taught, coached, and held administrative positions in the public schools and colleges for 30 years. Dr. Bryson received his Ed.D. from Duke Univesity. He is affiliated with several professional organizations. He has authored four books and several monographs on school law, philosophy and education administration as well as many articles and research reports.

Throughout America's public education history pressure groups have always sought to remake the public school curriculum in their philosophical-political image. Lawrence Cremin in *The Transformation of the School* beautifully describes this historical process.[1] Let extreme positions on either side of the political spectrum—the extreme left and/or the extreme right—cause serious abbreviation in the American society in general, and in the public schools specifically. Thus, it is not the normal conservative drift that is causing the pressure on the public school curriculum. It is the abreact conservative—the New Right—the religious fundamentalist New Right-Populists, that are seeking a transformation of the public school curriculum which reflect their religious-political views. Specifically, the emerging concerns of the fundamentalists New Right-Populists focus on: (1) secular humanism—that the public school is teaching a Godless form of religion known as secular humanism; (2) scientific evoluation v. creationism—the balanced treatment statute; (3) bible clubs, prayer in the classroom; (4) and most important, censorship of textbooks, library books, and instructional materials.

But the question is why are the public schools a convenient target for every unhappy citizen group in America? Perhaps the answer is the accessibility of schools. People often feel that they cannot fight Washington, the state capitol, or even city hall. So when there is a

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1. L. CREMIN, THE TRANSFORMATION OF THE SCHOOL (1961).

multitude of national problems, school boards are accessible and they hold open meetings. The school is down the street and open to parents who can demand to see principals, teachers, and other school personnel. Newspapers, television, and the media, in general, give schools so much attention that citizens often feel that almost everything wrong with the American society stems from the schools.

SECULAR HUMANISM

The Legal Aspects of "Secular Humanism"

An accusation brought against educators by religious-political interest of the New Right is the claim that the public schools are teaching a "Godless" form of religion known as "secular humanism." The accusation is particularly confusing to many educators who do not understand the concept or context of the charge.

Two issues seem to be at center-stage: (1) the fact that public schools cannot teach religion, and (2) the humanistic philosophy of education which supports the belief that education should be sensitive to the need of students. Humanistic philosophy has a different interpretation to explicate within the field of education and need clarification by educational leaders.

So explaining and clarifying "secular humanism" as a "religion" is not an easy task. The Gabler's organization, Education Research Analysts, defines secular humanism as a religion that "believes man is God and rejects biblical standards of living."[2] The Christophers, a New York based religious organization, suggests that secular humanism "places man at the center of the universe, designating him as the supreme ruler of Human destiny."[3]

The organization's declaring secular humanism as a "public school religion" have apparently combined such dictionary definitions as:

> **secular**—pertaining to wordly things that are not regarded as religious, spiritual, or sacred; temporal . . . .
>
> **humanism**—any system of thought or action based on the nature, dignity, interest, and ideals of man, specifically, a modern, nontheistic, rationalist movement that holds that man is capable of self-fulfillment, ethical conduct, etc. without recourse to the supernaturalism, etc.[4]

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[2] Education Research Analysts, Inc. (Longview, Texas) (untitled mimeographed sheet n.d.).

[3] The Christophers, *Christopher Ideas* (12 East 48th Street, New York, N.Y.) (printed sheet n.d.).

[4] WEBSTER'S NEW WORLD DICTIONARY OF THE ENGLISH LANGUAGE (2d College ed. 1920).

The gratuitous compounding of the two words seems to have given rise to a new label from which certain New Right religious-political action groups have created a bogus "religion" for public education.

Along with the above definitions, the New Right religious-political action organizations especially the Moral Majority (it should be pointed out at this time that the Moral Majority no longer considers the organization as religious—only political) cite a footnote in the Supreme Court's *Torcaso*[5] decision. This case concerns a person who was refused a commission in the Office of Notary Public, Maryland, because he would not declare a belief in God. The Court with Justice Hugo Black writing the majority opinion decided in favor of the plaintiff, insisting:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in religion." Neither can constitutionally pass belief laws to impose requirements which can aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[6]

The above quote plus footnote eleven are the legal basis given by the New Rights religious-political groups maintaining that secular humanism is a religion. Footnote eleven in part states:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Cultural, Secular Humanism, and others.[7]

The same New Right groups cite the *Seeger*[8] case which concerned conscientious objectors but which contains no mention of secular humanism. Thus, there appears to be no basis for a definition of secular humanism as presented by the New Right religious-political groups especially as such relates to the public schools.

Justice Hugo Black establishes a very narrow definition of the term God and really a very narrow definition of the religions indicated in footnote eleven in the *Tarcaso* decision. A broader definition might include a universal being or spirit and an encapsulating world order. Certain Buddhists and Taoists believe in God, and Ethical Culturalists believe in a world order which was the Supreme Court's position in *Seeger*. It is intuitively obvious, based on simple logic, that secular humanism is not a religion. For as already indicated in this manuscript, secular humanism cannot be Godless and be a religion. Such tautology will not stand logical analysis. Thus, the charge that public schools are teaching a Godless form of religion is a bogus assertion.

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[5] Torcaso v. Watkins, 367 U.S. 488 (1961).

[6] *Id.* at 495.

[7] *Id.*

[8] United States v. Seeger, 85 S. Ct. 850 (1964).

Finally these New Right religious-political organizations point to the Humanist Manifesto I of 1933 signed by Professor John Dewey and the updated Humanist Manifesto II of 1973, signed by Professor B. F. Skinner as further indicators that public schools are tainted by secular humanism. The logic is simple—since these two documents were signed by these two prominent educators, and since many educators are disciples of these two men, it follows that all public school educators embrace the education philosophy and the two Humanist Manifesto documents. Parenthetically, and while it may be a sad commentary on Professor Dewey's absolute influence, most people who praise Professor Dewey have never read him and conversely most people who criticize Professor Dewey have never read him. It is doubtful that many school teachers have ever read Professor Dewey. Professor Skinner's influence has always been more process than substantive.

On the above basis such New Right religious-political organizations as the Heritage Foundation, Educational Research Analysts, Parents Watching in the Schools, the Moral Majority, and others pressure the public school curriculum, administrators, and teaching faculties. The New Right groups insist that children disbelieve in God after exposure to secular humanism. Sex education, value clarification, humanities courses, and science courses of course emphasizing Darwin's theory of evolution are attractive targets.

However, behind the confusing controversy of secular humanism lies the basic premise of American public schools. The New Right appears to view the public schools as a place of indoctrination to truth and values as viewed by the New Right groups themselves. Conversely the New Right views the public schools as a place to suppress or limit access to information. The New Right groups are certainly at odds with Professor John Dewey on these issues. Professor Dewey always insisted that it was the purpose of American public education to teach children how to think, not what to think. Under any circumstances in order to educate children in a rapidly changing, pluralistic, democratic society, it appears that educators will have to be aware of pressures which invite New Right censorship activities that prevent opportunities for students to think, learn, and explore ideas.

Finally in the most recent litigation action concerning secular humanism Justice Perluss in *Seagraves*[9] insisted that teaching evolution does not imply teaching a religion known as secular humanism.

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[9] Seagraves v. State of California, No. 278978, *oral discussion* (Cal. Super. Ct. 1981).

SCIENTIFIC CREATIONISM

Genesis statutes, applicable to public school curriculum, are really nothing new. The legendary *Scopes*[10] decision, in which Clarence Darrow and William Jennings Bryan engaged in a major metaphysical debate concerning the book of Genesis and evolution, is always a celebrated departure into this issue. But equally celebrated and certainly more judicially important is the Supreme Court's *Epperson*[11] decision.

This landmark decision insisted that Arkansas legislative enactment, modeled after the Tennessee statute, prohibiting teaching the theory of evolution was unconstitutional. The issues in this case encapsulated an Arkansas public school biology teacher who was scheduled to use a newly adopted biology textbook that included a chapter concerning Darwinian theory of evolution, which teaching such theory was prohibited by the statute. The teacher litigated the statute and Justice Fortas writing the Court's opinion insisted that "Plainly the law is contrary to the mandate of the First and in violation of the Fourteenth Amendment to the Constitution."[12] Justice Fortas maintained that: (1) Government may not aid, foster, or promote one religion or religious theory over another; (2) government may neither advance or oppose religion; (3) "Laws that cast a pall or orthodoxy over the classroom" are flawed with first amendment violation; (4) while study of the Bible and religions from a historical and literary viewpoint is a legitimate exercise of the secular programs of the state the first amendment insists that curriculum programs and practices not favor and/or oppose religion; and (5) the state's authority to prescribe curricula cannot include punishing teachers, on pain of criminal penalty, in this case teaching Darwin's theory of evolution.

The *Epperson* decision is a prime example of the Supreme Court response to "Genesis" statutes by legislative fiat. While the Arkansas General Assembly legislative action is the focal point of *Epperson* other states throughout America's history have enacted "Genesis" statutes. Thus, whenever there are legislative imperatives, school board policies, and/or school administrative discretion encapsulating religion and the education process—irrespective of the complainant—the *Epperson* diction provides judicial guidelines for cutting the constitutional Gordian knot.

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[10] Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (Tenn. 1927).

[11] Epperson v. Arkansas, 393 U.S. 97 (1968).

[12] *Id.*

[13] *Id.* at 105. *Quoting* Keyishian v. Board of Regents, 385 U.S. 603 (1967).

There is now a new kind of "Genesis" statute known as the "balance treatment statute." This new national phenomenan requires that a balance treatment be presented when teaching human origins—balance treatment between scientific evolution theory and scientific creationism. In early 1981 the Arkansas General Assembly enacted this new breed of "Genesis" statute—the "balance treatment statute." Already the statute has been litigated and a federal district court in Little Rock has declared the statute unconstitutional as first amendment religious advancement—a "Genesis" statute in any form is still a "Genesis" statute.[14] Louisiana's General Assembly has enacted a "balanced treatment statute" into law. And at this writing some nineteen other states have similar legislative proposals. The Louisiana statute has already been litigated. The state school board, state superintendent, and state department of education refuse to enforce the statute until the statute is declared constitutional. Litigation was initiated by the state attorney general on behalf of numerous plaintiffs including the legislative sponsor. Judge Frank Polozola dismissed one suit June 28, 1982 insisting there was no need for the federal court to make a judgment when the dispute was between state officials. Thus, the matter belonged in state court.[15]

Finally it should be pointed out that the *Seagraves*[16] case from California was the first case litigated concerning the new breed of "Genesis" statutes. Justice Irving Perluss while maintaining the religious rights of plaintiffs were not violated by teaching evolutionary theory insisted that educators must be sensitive to religious beliefs of students. And that "dogmatism must be changed to conditional statements where speculation is offered for origins."[17] Justice Perluss did insist that "the teaching of scientific creationism is unacceptable," and as a matter of fact would constitute first amendment establishment.[18]

CENSORSHIP OF LIBRARY BOOKS AND INSTRUCTIONAL MATERIALS

Without a doubt the New Right religious-political groups have but their greatest imprimature as prevaricating censors of library books, textbooks, and other educational materials. But censorship is really nothing new in human history.[19] For censorship has been a human activity since humankind stood upright on the face of this earth—or at least since early recorded history. From paleolithic hunter to neolithic farmer and to modern man fire has been used as a symbol of cleansing. Burning is always the most severe form of censorship—both books and people. The Book of Jeremiah describes the burning of a scroll by King Juhoiakim in Jerusalem. Plato's *The Republic* rejected the use of bad fiction with children.

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[14] McLean v. Arkansas Board of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).

[15] Keith v. Louisiana Dep't of Educ., No. 81-989-B (M.D. La. 1982).

[16] Seagraves v. State of California, No. 278978, *oral discussion* (Cal. Super. Ct. 1981).

[17] *Id.*

[18] *Id.*

> And shall we just carelessly allow children to hear any casual tales which may be devised by casual persons and receive into their minds ideas for the most part the very opposite of those we should wish them to have when they are grown up? We cannot. Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad. . . .[20]

History also suggests that Plato urged the burning of Democritus' books (Democritus published more than seventy-two books yet only fragments exist today) perhaps because Democritus' cosmology did not agree with Plato's "Doctrine of the Ideal of the Supreme Form."

Early Christians, embracing their new philosophy, were prompted to burn any of their own books opposed to the teachings of Jesus. And only a few books in the famous library in Alexandria, Egypt, escaped destruction when Omar, leader of the Moslems, captured the city in A.D. 642. The library contained perhaps 700,000 volumes at one time. Yet the historical record indicates the scrolls were used to heat the four thousand baths of the city for at least six months. The Christian church early in its history was involved in censorship. At the Council of Nice in A.D. 325 the Council condemned the teaching of Arius and his book *Thalia* and in A.D. 405, Pope Innocent I sent Bishop of Toulouse a list of "authentic books of the Bible and listed a number of apocryphal documents that were condemned."[21]

The history of censorship continues to unfold. Perhaps Thomas Jefferson's thoughts of 168 years ago can best introduce this era and topic concerning conservative censorship pressure of the public school curriculum. In 1814 Thomas Jefferson sought a French scientific publication from a Philadelphia book agent and when informed that the book was unavailable because of religious censorship from authorities in Philadelphia, wrote the following letter to his book agent, N.G Dufief:

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[19] For a more complete history and analysis of censorship *see* J. BRYSON & E. DETTY, THE LEGAL ASPECT OF CENSORSHIP OF PUBLIC LIBRARY AND INSTRUCTIONAL MATERIALS (1982).

[20] PLATO, 2 THE DIALOGUE OF PLATO, THE REPUBLIC (B. Jowdt trans. 1892).

[21] R. BURKE, WHAT IS THE INDEX? 5 (1952).

> Is this then our freedom of religion? And are we to have a censor whose imprimature shall say what books may be sold, and what we may buy? . . . Whose foot is to be the measure to which ours are all to be cut or stretched? Is a priest to be our inquisitor, or shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe? It is an insult to our citizens to question whether they are rational beings or not, and blasphemy against religion to suppose it cannot stand the test of truth and reason. (Letter to N.G. Dufief dated April 19, 1814.)

In decade of the 60's schools signaled a change in direction. Financed in part by federal funds fostering change and innovation—open classroom, team teaching, individualized instruction, modern math, ungraded instruction, alternative curricula, etc., are but a few of the activities—the school seemed to confuse many parents. The traditional classroom seemed to almost disappear. Moreover, parents had some difficulty understanding their children's homework. The new educational philosophy moved from teaching fact to understanding concepts—decision making, thinking skills, and values clarification. Too often it seemed to parents that children decided how, what, and when concerning instruction.

The new philosophy opened a new direction for literature for children and young people. The new literature was realistic and predicated on societal change. The new literature emphasized personal and social problems, and explored themes formerly reserved for parents. The old literature was uplifting and challenged the child's imagination—parents understood this direction because it was the literature of their life. The new literature featured themes such as one-parent households, divorce, estranged parents, foster-home living, working mothers, living on welfare, parent dating, death and dying, ethic groups living in a pluralistic society, the changing roles of males and females, adolescent physical change, pregnancy, abortion, homsexuality, birth, use of drugs and alcohol, etc. Moreover, many of the books described the above themes using street language. Likewise, as always, there were well written books describing these themes and poorly written books.

In the early 1960's the National Association for the Advancement of Colored People, the John Birch Society, Committee for Fundamental Education (California), American Legion, Daughters of the American Revolution, brought pressure on school boards concerning textbooks, library books and instructional materials selection. The issues range included, but were not limited to: (1) literature offensive to minorities;

(2) anti-Communist; (3) the New Deal; (4) United Nations; (5) Tennessee Valley Authority; and (5) secular humanism. At close of the decade of the 60's, books were disappearing from the school shelves and textbooks were undergoing modest change before adoption. Of course in Hegel's logical scenario the American Civil Liberties Union appeals along with others to help establish the synthesis, and many of these issues were litigated. With notable exceptions the above groups were not ultra-conservative.

During the decade of the 70's the censorship pace quickened. Led by Mel and Norma Gabler's Educational Research Analysis, Inc., the Heritage Foundation, parents Watching the Schools, Eagle Forum, electronic media evangelists, politicians—local, state, national, Creation Science Research Center (California), some parents and others, the New Right religious-political activities pressured the public school curriculum with censorship as the major focus. The Gabler's "ten categories of objectionable content" best represent the concerns of the New Right. They are: (1) Attack of Values, (2) Distorted Content, (3) Negative Thinking, (4) Violence, (5) Academic Unexcellence, (6) Isms Fostered (Communism, Socialism, Internationalism), (7) Invasion of Privacy, (8) Behavioral Modification, (9) Humanism, Occult, and Other Religions Encouraged, and (10) Other Important Educational Aspects.[22]

Dawn decade of the 80's the New Right with an understanding American president and leadership from the United States Senate plus all the above organizations presented a national force exorcising the public school curriculum as no other single force in the history of American public education. Censorship of textbook, library book, and instructional materials receives the greatest public attention. The antithesis has now been identified.

During the decade of the 70's there was more censorship of public school libraries and instructional material than any other period of American public education history. Litigation almost always follows the censorship practice. Some jurisdictions are more supportive of school boards in whatever the policy or practice turns out to be. However other jurisdictions support students, teachers, and parents who oppose censorship policies and practices of school boards. Litigation almost always include the following issues: (1) academic freedom of public school teachers; (2) right of students to read and receive information, the school as a market place of ideas; (3) school board authority to select and remove library and instructional materials; (4) parents' right to direct the education of children; and (5) religious freedom of public school students related to use of library and instructional materials.

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[22] Educational Research Analysts, Inc., *Textbook Reviewing Categories*, (Longview, Texas) (mimeographed n.d.).

Summary of Censorship Cases

Three major issues have been addressed by the judiciary relative to questions concerning censorship of school library and instructional materials. They are: (1) authority of school boards in selection, removal, or restriction of materials; (2) constitutional rights of school personnel, students, and parents in selection and use of library and instructional materials; and (3) obscenity of questioned materials.

Based on an analysis of cases the trend suggests that courts most often favor school boards. In almost every censorship case, the judiciary expressed reluctance to become entangled in the day to day school operation in which school boards are vested with authority. However, when constitutional issues are in question the judiciary does not hesitate to become involved.

The litigious issues in censorship cases encapsulating conflict between school board authority and constitutional concerns are: (1) academic freedom of teachers; (2) students' right to read and receive information; (3) parents' right to direct their children's education; and (4) violation of the establishment of religion clause.

An analysis of judicial decisions suggest that students' rights will prevail over parents' rights to determine the education of children. In reality, parents' constitutional support received little attention in censorship cases while students' constitutional rights stand alone. Using the *Miller*[23] case as a standard, none of the cases involving the objectionable materials issue were considered obscene.

There are conflicting judicial philosophies emerging from many of the United States circuit courts of appeals. There are: (1) decisions supporting school board authority were heard almost entirely in the Second Circuit; (2) decisions supporting the individual rights of students and teachers were decided within the First, Sixth, and Eighth Circuits; and (3) decisions out of the Fifth, Seventh, and Tenth Circuits suggest an even-handed approach at publication date.

The United States Supreme Court is likewise divided. There are four Justices in the *Pico* majority that are concerned when school board censorship policy is predicated on personal political and religious ideological preferences. On the other horn are four Justices who make up the *Pico* minority would grant greater latitude to school boards in library material selection and removal. The minority reasoning is anchored in the "views of the community" concept, "elected officials express the views of their community."[24] Finally, Justice White, even though concurring in the judgment, has deferred his opinion until another day. "When the findings of fact and conclusions of law are made by the district court . . . ."[25] Justice Rehnquist was annoyed with Justice White's deferred action.[26] So and perhaps Justice White holds the identity to future majority censorship decisions.

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[23] Miller v. California, 93 S. Ct. 2607 (1973).

Miscellaneous Conservative Pressures on the School Curriculum

There is an assortment of church-state related curriculum and extracurriculum activities pursued by New Right organizations. Some of these activities are: (1) Bible and/or prayer clubs, (2) a new breed of school prayer laws—from a prescribed prayer—Alabama's "James Law" to Tennessee's "moment of meditation or prayer" (Tennessee's statute has been declared unconstitutional as advancement of religion and Alabama's statute has been barred until a constitutional test), (3) celebration of religious holidays, (4) religious symbols, (5) religious courses, and (6) use of school facilities by religious groups. The increased legislative pressure by the New Right and legislative activities bring litigious opportunities where the case law is already voluminous.

CONCLUSION

There is some indication that the New Right might have peaked in religious-political influence and energy. School boards and school officials would be well advised to reject these early signals for a variety of reasons: (1) the current New Right constituencies are concerned about many national problems—jobs, crime, "social" legislation—these issues are not going away momentarily; (2) the New Bible Belt is really national in scope because of the electronic media influence—there is a religious nationalism developing and laden with patriotic fever; and (3) we are probably in a major watershed—much larger than we supposed. There will be many significant ideological shifts over the next few years—there will be no stereotypical "conservative" or stereotypical "liberalism" flourishing. The thesis v. antithesis is producing a new synthesis—the "middle of the road" is no longer located where yesterday's ideological map indicated. The New Right will play a significant role in ideological shifts. The public school curriculum will also be reflective and affective in the ideological shifts.

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[24] Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 50 U.S.L.W. 4831 (1982).

[25] *Id.* at 4839.

[26] *Id.* at 4845.

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Parental Liability for Student Vandalism

JAMES L. WILSON*

James L. Wilson is a practicing attorney at Surf City, New Jersey where he is senior partner with the law firm of Wilson & Kiss. He represents several boards of education and specializes in school law. He is a member and past president of the New Jersey Association of School Attorneys and belongs to the Educational Negotiators Association. Mr. Wilson spends considerable time working for a better understanding of educational oriented law.

VICARIOUS LIABILITY

Vicarious liability implies that there was no direct fault on the part of the parents, such as participation or an implied authorization, since under those circumstances the relationship would be unimportant. Vicarious liability is not new to the law, but the logic of other types of cases does not always translate easily to the school situation.

REVIEW OF CASES

The recent New Jersey case of *Board of Education of Piscataway v. Caffiero*[1] has given us an occasion to review the problem of the vicarious liability of parents for the vandalism of their children to school property.

One feature of *Piscataway* was a rather substantial monetary loss, resulting in the utilization of all available legal remedies, with three published opinions, and ultimate denial of an application for certiorari by the United States Supreme Court.

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[1] 159 N.J. Super. 347, 387 A.2d 1263 (N.J. Super. Ct. Law Div. 1978); 173 N.J. Super. 204, 413 A.2d 981 (N.J. Super. Ct. App. Div. 1980); 86 N.J. 308, 431 A.2d 799 (1981), *cert. denied*, 102 S. Ct. 560.

New Jersey has not one, but two parental liability statutes, giving us an opportunity for comparison. The first,[2] dating from the 1860's creates an absolute liability on parent or guardian, without monetary limitation, for damages by a pupil to school property. The other,[3] more recent, imposes liability upon parents or guardians "who fail or neglect to exercise reasonable supervision and control of the conduct of such infant. . . ." Again there is no limit on the amount that may be recovered.

In 1961, in *Kelly v. Williams*,[4] the Texas Court of Civil Appeals sustained the constitutionality of the Texas law, which makes parents liable up to $300, the case involving damage to a stolen car resulting from a high speed chase. The court spoke of compensating victims and referred to the 24 other states that had adopted parental liability statutes.

The North Carolina case of *General Insurance Company v. Faulkner*[5] in 1963 was a subrogation case arising out of a school fire started by an 11-year-old. The Supreme Court of North Carolina said the parental liability statute was within the police power and not violative of due process or equal protection. It mentioned dissatisfaction with the common law rule, which, it said, often left the injured party with a worthless action against an insolvent minor, and was frequently circumvented by the courts through dubious agency relationships and strained foreseeability rule. It mentioned 31 other states with parental liability statutes.

The Supreme Court of Wyoming, in *Mahaney v. Hunter Enterprises*,[6] in 1967, sustained a judgment against the parents of two boys who broke a plate glass store window and departed with some of the contents. It cited *Kelly v. Williams* and *General Insurance Co. v. Faulkner*, and saw no constitutional objection, even though Wyoming had previously rejected the family car doctrine.

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[2] N.J. REV. STAT. § 18A:37-3. The parents or guardian of any pupil who shall injure any school property shall be liable for damages for the amount of the injury to be collected by the Board of Education of the district in any Court of competent jurisdiction, together with costs of suit. (Title 18A is the Education Law of New Jersey.)

[3] N.J. REV. STAT. § 12A:53A-14 (1979). The Legislature finds that malicious acts of vandalism by youths are increasing at an alarming rate; that such acts are frequently attributable to lack of care, custody and control exercised by the parent; that parents should have some responsibility for the conduct of their children; that while there is reluctance to charge a child with juvenile delinquency there should be some legal deterrent to juvenile acts of vandalism and to parental neglect of child supervision. The Legislature therefore finds it desirable to establish a civil procedure for the recovery of damages for such acts from the neglectful parent, guardian or other person having legal custody of the child who causes such damage.

N.J. REV. STAT. § 2A:53A-15 (1967). A parent, guardian or other person having legal custody of an infant under 18 years of age who fails or neglects to exercise reasonable supervision and control of the conduct of such infant, shall be liable in a civil action for the willful, malicious or unlawful injury or destruction by such infant of the real or personal proprty of another. (As amended in 1979 to delete limitation of recovery, formerly $250.00).

[4] 340 S.W.2d 434 (Tex. Civ. App. 1961).

[5] 259 N.C. 317, 130 S.E.2d 645 (N.C. 1963).

[6] 426 P.2d 442 (Wyo. 1967).

In re Sorrell,[7] a 1974 Maryland case, involved restitution ordered by a juvenile court judge for intentionally inflicted personal injuries and mentioned that there were now statutes in 46 states. It cited *Kelly*, *Faulkner* and *Mahaney* and a Georgia case, *Corley v. Lewless*,[8] in which the Georgia statute had been declared unconstitutional on due process grounds. It inferred that the unlimited liability of the Georgia statute made the difference. The court sustained the Maryland statute while remanding the case for procedural reasons.

Rudnay v. Corbutt,[9] a 1977 decision of the Ohio Court of Appeals, involving willful damage to a motor vehicle by minors, determined that the Ohio statute is compensatory, not penal, and therefore was governed by a two year, not the one year, statute of limitations.

In a New Jersey trial court the 1959 case of *Palmyra Board of Education v. Hansen*,[10] the parents of a high school student were held liable for damage of $344,000 caused by a fire he set. The judge saw no constitutional problems, saying:

> If the Legislature has the right to confer benefits on the people by way of a free education, it certainly has the right to set up the conditions under which such benefits shall be provided. . . . The conditions of liability are clearly set out for all to contemplate before enrolling their children in public schools. If a parent is unwilling to assume the liability, he may avoid it by enrolling his son in a private educational institution.

The *Piscataway* matter was moved for summary judgment before trial on the basis of an admission of the damage by the pupils, and of the relationship, but denial of parental wrongdoing, thus invoking the first but not the second statute.

The first statute had been upheld in the earlier case of *Palmyra Board of Education v. Hansen*, that court having justified the imposition of liability on the benefits of a free public education, conferred by the state and accepted by the parents, finding that the parents had exercised a choice between a public and private education. This was too much for the trial judge in *Piscataway*, who noted that this option was open only to those who were able to pay the costs of private education, or willing to risk the penalties of our compulsory education laws. He distinguished cases and statutes cited from other jurisdictions by noting that all those imposing absolute liability also had monetary limitations. Next, he considered another New Jersey case, *Doe v. Trenton*[11] that had declined to base liability on the theory that the family controlled the conduct of the child, finding that:

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[7] 20 Md. App. 179, 315 A.2d 110 (Md. Ct. Spec. App. 1974).

[8] 227 Ga. 745, 182 S.E.2d 766 (Ga. 1971).

[9] 53 Ohio App. 2d 311, 374 N.E.2d 913 (Ohio Ct. App. 1977).

[10] 56 N.J. Super. 567, 153 A.2d 393 (N.J. Super. Ct. Law Div. 1959).

> [T]he family is just one of the numerous inter-related forces, including schools, housing, recreation, community life, employment, and the juvenile justice system itself, which influence a juvenile toward or away from a life of delinquency.[12]

He declared the statute unconstitutional, relying also on the Georgia case and quoting the *Doe* court:

> While Euripides reminds us that the gods often visit the iniquities of the fathers upon the children, we are not yet prepared to say that the converse ought to be so.[13]

The case then moved to the appellate division, where it was consolidated with a similar case from the Borough of Roselle, where the damage had been inflicted by a child interestingly named Angel. The parties were also augmented by a deputy attorney general and by "Nolpean," David Carroll of the New Jersey School Boards Association, both *amicus curiae.*

In reversing, the appellate division shrugged off the Georgia case in a manner that won't set well in Atlanta:

> [The Georgia Court] relied heavily upon the policy of Georgia against imposition of liability without fault. The general trend is, of course, to the contrary.[14]

A divided appellate division found the statute in question to be an entirely reasonable means of achieving essential state purposes, *i.e.*, paying for vandalism losses and pressuring parents to control their children. There are indications that judicial discussions had become a little testy. Judge Crane began his dissent by stating that he felt that rules of law should be rational. He went on to say that all New Jersey authority relied upon by the majority were distinguishable because they involved situations where the defendants were implicated in the creation of the risk, ignoring the creative aspects of parenting. He hinted that the result closely resembled an act of attainder, in violation of both the state and federal constitutions.

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[11] 143 N.J. Super. 128, 362 A.2d 1200 (N.J. Super. Ct. App. Div. 1976), *aff'd per curiam*, 75 N.J. 137, 380 A.2d 703 (N.J. 1977).

[12] Piscataway v. Caffiero, 159 N.J. Super. 351 (N.J. Super. Ct. Law Div. 1978), *attributed to*, 19 WAYNE L. REV. 155 157 (1973).

[13] *Id.*

[14] *Id.*, 143 N.J. Super. 128 at 133.

In New Jersey, a dissent in the appellate division entitles the loser to be heard by the supreme court, and cases move onward and upward. The supreme court affirmed this case, adding a few meaningless distinctions, such as limiting the application of the statute to public school students, to custodial parents and guardians, and to damages that were willful or malicious. It ruled out negligent damage, and damage without fault. The court left to another day the question of a public school student who causes damage in a different school system. The court could see no problem of due process, or of causal relationship. It saw no problem in the cases that bothered Judge Crane, and found that the parent-child relationship was a rational and reasonable basis for liability for purposes of compensation and deterrence. It relied upon the United States Supreme Court as authority that parents have an important "guiding role" to play in the upbringing of their children.

> Through better parental supervision and guidance the Legislature hoped to deter delinquent conduct. Our concern is not whether the hope has been or will be fulfilled, but whether there is a rational basis for it.[15]

Justice Clifford, in his dissent, began with a quote to the effect that the two things the public should never see made are sausage and the law, attributing it to Disraeli. (Here the reporter dissented, stating in a footnote that it is usually attributed to Bismarck.) Clifford went on to call the statute a Civil War relic, from the "spare the rod" era. He said there wasn't the faintest hint of what had moved the legislature to come up with "this curiosity," other than some vague idea of discipline of pupils in the public schools. He said that until recently the statute had mercifully been consigned, unused and unrecognized, in a state of desuetude, and he deplored the failure of the court to give it the sockdolager[16] it so richly deserves. The case was dismissed by the Supreme Court for want of a substantial federal question.

Compare a more recent case, *Alber v. Nolle,*[17] with *Piscataway.* While this case involved personal injury, it was under a statute that covers property damage as well, not limited to school property. Parents were held liable for the damage inflicted by their minor daughter, a runaway, not domiciled with her parents, who are described as having made heroic efforts to control and to rehabilitate their daughter.

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[15] *Piscataway,* 86 N.J. 308 at 320.

[16] WEBSTER'S NEW COLLEGIATE DICTIONARY (1977) at 1103. Sockdolager. n. 1. Something that settles a matter: a decisive blow or answer. Finisher.

[17] No. 5323 (N.M. Ct. App. May 4, 1982).

STATUTE REVIEW

An overview of the statutes shows laws have been enacted by 49 states, New Hampshire being the apparent exception. Maryland's statute seems to have been lost in a general recodification, leaving 48 with present statutory remedies. All but Alabama, Hawaii, Nebraska and New Jersey have dollar limits on recovery, varying from $200 to $10,000. There are a number of special qualifications, such as "residing with," "in the custody of," "unemancipated." Tennessee requires a showing that the parents knew of the destructive tendencies, and having an opportunity to correct them failed to do so. Utah permits the parents to raise as a defense that they had made a reasonable effort to supervise their children. New York says that emancipation is a defense, but due diligence is not. Georgia's new law, with a $5000 limit and a statement that its intent is the public welfare and the control of delinquency has survived a constitutional challenge. Illinois, with a $1000 limit says its object is compensation for the damage. Nevada's $10,000 limit applies to the parents, but there seems to be no limitation on recovery from the children. Three states add attorney's fees to the recovery.

SUMMARY

What do we derive from all this? First of all, there is apparently a common law claim, or its equivalent, in all states, meaning that parents can be held responsible if it can be established that the vandalism was the reasonably traceable result of lack of supervision or misdirected parenting. Next, that almost all legislatures feel that it is appropriate to place some liability on the parents without such proof, and most of the courts have gone along with them. They differ as to why, and the reasons given are not satisfying. Third, it is hard to see how a statute with a monetary limit can be said to have as its purpose compensation for damage of any significance, particularly given the present day cost of litigation. Yet if these are intended as a deterrent, this would appear to make them penal, but not one mentions proof beyond a reasonable doubt. Lastly, to permit the efforts of parents to supervise their children to come into the cases would create a quagmire of unlimited potential. At the same time, the failure of the courts to detect any due process problems in these statutes opens the way for disaffected children to lay substantial burdens upon their helpless parents while remaining cheerfully judgment-proof themselves. There is some precedent for insurance protection for parents under homeowners policies.

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Teacher Dismissal for Immoral and Illegal Conduct

Floyd G. Delon

Floyd G. Delon has been Professor of Educational Administration at the University of Missouri-Columbia since 1969. He received his doctorate from the University of Arizona in educational administration and public law. His writings have been published in various state and national journals of education and law. Among his major works are editing of *The 1974 Yearbook of School Law* and authoring chapters in the 1973, 1977, 1978, 1979, and 1980 *Yearbooks*. Dr. Delon has authored two monographs for NOLPE and three monographs for Education Research Service and co-authored a book, *The Law and the Teacher in Missouri*, which appeared in its third edition in 1981. During the 1972-78 Summer sessions he taught school law as a visiting professor at Montana State University. He was awarded Fulbright grants for service in Iran (1975-76) and Cyprus (1983).

INTRODUCTION

An investigation of the various issues associated with this type of litigation reveals that significant changes have occurred. The traditional approach of the courts was to accept as "reasonable cause" for teacher dismissal any conduct, in school or out-of-school, that set a bad example for students.[1] Beginning in the late 1960's, the courts of some states shifted to a position requiring that an employer establish a nexus between the objectionable conduct and the individual's fitness to teach.[2] Teacher plaintiffs in 1970's, in addition to arguing absence of the required nexus, contended that their dismissals for personal conduct violated various constitutional rights. For example, in Oregon a teacher successfully argued that the statutory ground of immorality was unconstitutionally vague.[3] Therefore, the dismissal of this teacher who admitted being a practicing homosexual violated her fourteenth amendment due process rights. Other constitutionally based challenges have relied on substantive due process, privacy rights, and equal protection of the laws.

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1. Horosko v. School Dist. of Mt. Pleasant Twp., 6 A.2d 886 (Pa. 1939).
2. Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969).
3. Burton v. Cascade School Dist., 353 F. Supp. 254 (D. Or. 1973).

This chapter contains an examination of a cross-section of cases illustrating recent pronouncements of the courts in this area. From these an attempt is made to identify any consistent patterns of adjudication which have emerged and to describe implications for school operation.

IMMORAL CONDUCT

The first grouping of cases all involve sexual conduct of some kind. The selected cases fall into three subgroups: homosexual conduct, misconduct with students, and other sexual conduct.

Homosexual Conduct

Public attitude toward homosexuality is probably more tolerant today than it has ever been. Yet, those who would accept a homosexual teacher as an appropriate role-model for pupils probably represent a small minority in most communities. Objectivity toward homosexual conduct is diminished by a widely-held belief that homosexuals actually represent a threat to the welfare of children.

In *McConnell v. Anderson*,[4] a federal district court ordered the University of Minnesota to honor the contract of an admitted homosexual employed as a librarian. However, the Eighth Circuit Court reversed the decision because of the employee's activist role in advocating his chosen life style and the adverse publicity that resulted.

The same rational appeared in a similar decision pertaining to a junior high school teacher's dismissal.[5] However, the court did state that homosexuality was an activity protected by the right of privacy. The court said that:

> [T]he time as come today for private consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty.

The court held, nonetheless, that the dismissal was justified because of the teacher's activities such as radio and television appearances which tended to spark controversy and produce harmful effects on the educational program. On appeal, the Fourth Circuit Court rejected this rationale, but affirmed the dismissal on other grounds.

One might reasonably conclude that public homosexual conduct alone is a firm ground for removing a teacher because of the "bad example" it sets for students. However, in 1977 the California Supreme Court affirmed a trial court's rejection of this exemplar rationale.[6]

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[4] McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

[5] Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 489 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

The plaintiff was arrested for homosexual solicitation in a public restroom. Although charges were never filed, the arresting officer testified in the present suit that the teacher

> entered the adjoining stall, bent down and looked up at the officer from under the partition separating the stalls. The officer dressed and, looking into [the teacher's] stall, observed him masturbating . . . then [he] beckoned to the officer, saying "come here." "You will like this."

The teacher denied the allegations but the trial court accepted the officer's version.

The remaining testimony concerned the teacher's fitness to teach. Both the teacher's principal and another school principal who did not know him testified that the teacher was unfit. The latter witness gave as reasons for his opinion that the teacher

> could not provide a behavioral example to students and that his conduct would create uneasiness and an erosion of confidence in those with whom he was in association. . . .

A psychiatrist, testifying as an expert witness for the teacher, indicated that he was not a homosexual, that the act was precipitated by "an unusual accumulation of pressure and stress," that "there was no danger of recurrences" and that "there was no danger to pupils or associates."

Since the description of the teacher's conduct was accepted by the trial court, no issue of fact existed that a public homosexual solicitation took place. The decision turned on not this determination but on the evidence concerning fitness and its nexus with the conduct. Evidently, the trial court found the psychiatrist's expert testimony more convincing than that of the school administrators. The state supreme court held that the trial court could have reasonably concluded that "the isolated incident of poor judgment was overweighed by years of demonstrated teaching competence."

This same year a divided Washington Supreme Court, affirmed a decision upholding the dismissal of an admitted homosexual teacher.[7] The courts of that state have construed the statutes as imposing a nexus requirement. The instant case had reached the high court once before and had been remanded because the district had not met this statutory burden of proof. The appeal this time came from a judgment of the trial court on new findings and conclusions. The supreme court identified its task as a review of two basic issues of whether substantial evidence supported the findings: (1) that the teacher was guilty of immorality and (2) that the teacher's fitness was thereby impaired justifying his discharge.

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[6] Gaylord v. Tacoma School Dist. No. 10, 535 P.2d 804 (Wash. 1975), *aff'd*, 559 P.2d 1340 (Wash. 1977), *cert. denied*, 434 U.S. 879 (1977).

[7] Board of Educ. of Long Beach v. Jack M., 566 P.2d 602 (Cal. 1977).

The plaintiff's homosexuality became known after a former student reported his suspicions to the school's vice-principal. When confronted by the vice-principal, he admitted that he was a homosexual. The dismissal for immorality followed. Additional facts coming out in the trial were that the teacher had known that he was a homosexual for 20 years, that he had in the two-year period prior to his discharge actively sought out the company of other male homosexuals and participated as a member of the Dorian Society (a homosexual organization), that he had responded to a blind advertisement in the society's paper for homosexual company, and that he had concealed his homosexuality from his parents.

In light of these facts, the supreme court found the evidence sufficient to support the conclusion that homosexuality constitutes immoral conduct. This evidence included excerpts from scientific treatises, encyclopedias, dictionaries, and expert testimony by a sociologist and a psychiatrist. Since at the time of Gaylord's discharge, state statutes listed sodomy as a crime, the trial court concluded that his personal conduct as illegal as well as immoral. Because those provisions were subsequently repealed, the supreme court was faced with the question of whether such acts now legal could still be considered immoral. According to the opinion, this action of the legislature did not relieve the conduct of his immoral status.

Turning to the second issue, the high court again found that substantial evidence supported the trial court's finding and conclusions regarding the effect of the teacher's immorality on his efficiency. The court's majority gave no weight to the teacher's argument that his homosexuality became known only after this information was revealed by school officials. The evidence indicated that at least one student objected to his continued employment and three fellow faculty members objected both as teachers and parents. The principal and vice-principal testified that Gaylord's presence would create problems. Although acknowledging some conflicts in the evidence regarding the teacher's impairment, the supreme court concluded that the trial court had not erred in its determination.

The refusal of the United States Supreme Court to review *McConnell* and *Acanfora* as well as *Gaylord v. Tacoma School District*, suggests that constitutional privacy protections for homosexual teachers will not soon become the law of the land. This assumption is further supported by the Supreme Court's summary affirmation of a three-judge federal court's holding that Virginia's sodomy statute was not unconstitutional when applied to consenting adults. [*Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) *aff'd mem.*, 425 U.S. 901 (1976)]

Misconduct With Students

Teachers who become sexually involved with students or other minor children have a consistent record of failure in getting their dismissals overturned in states that have a nexus requirement and in those which do not. This direct involvement of students would appear to reduce drastically the employer's task of proving unfitness since courts have tended to view such conduct in and of itself sufficient evidence.

One of the first cases in which the court's examined the application of the nexus requirement to this type of dispute was *Denton v. South Kilsap School District.*[8] The plaintiff, a junior high school teacher, became acquainted with a female high school student. After obtaining her parents' permission, they began dating during the summer. She became pregnant in the fall and they were married shortly thereafter. The board dismissed him for immorality and he brought this action.

Denton relied heavily on *Morrison*, arguing that discharge of a teacher cannot be predicated upon sexual immorality absent a showing that the conduct impacts adversely upon the teacher's fitness to teach. Although the court noted that this reasoning was consistent with its earlier position the Washington Supreme Court ruled:

> [We] decline to set such a requirement where the sexual misconduct directly involves a teacher and a minor student. In our view, the school board may properly conclude in such a situation that the conduct is inherently harmful to the teacher-student relationship, and thus to the district.

The court affirmed the trial court's judgment for the board.

A Florida elementary school teacher petitioned the court for a review of the State Board of Education's decision sustaining his dismissal for immoral conduct.[9] The charges were based on an after school hours incident in which the teacher performed cunnilingus on his nine-year-old stepdaughter.

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[8] Denton v. South Kilsap School Dist., 516 P.2d 1080 (Wash. 1973).

[9] Tomerlin v. Dade Cty. School Bd., 318 So. 2d 159 (Fla. Dist. Ct. App. 1975).

The teacher argued that the dismissal "statute is unconstitutional unless it is interpreted to connect his immoral conduct with his job performance." His prior record as a teacher was unblemished and expert testimony was given that he was not likely to repeat the offense. Nonetheless, the court found the necessary nexus:

> Although Tomerlin's immoral act was done at his home and after school hours, it was indirectly related to his job. His conduct is an incident of a perverse personality which make him a danger to school children and unfit to teach them. Mothers and fathers would question the safety of their children; children would discuss [his] conduct and morals. All of these relate to Tomerlin's job performance.

The court let the dismissal stand.

The Colorado Supreme Court reviewed a case in 1976 involving a challenge to the dismissal of a teacher charged with immorality.[10] The charges resulted from incidences that occurred during a field-trip in which the teacher served as a chaperone. For example, he engaged in activities that he termed "good-natured horse play" that consisted of "touching and tickling the girls on various parts of their bodies and occasionally between the legs in proximity to the genital areas."

In deciding that the board must establish a nexus, the court ruled:

> *Though [the statute] does not explicitly require that the "immorality" be in relation to, or affect, the teacher's work we believe that such a requirement can be readily implied from the language of the statute.* The statutory ground of immorality, taken in conjunction with the other grounds of physical and mental disability, incompetency, neglect of duty, conviction of a felony, and insubordination, clearly implies a standard that is directly related to the teacher's fitness for service. We hold therefore that the appellant's action cannot constitute immorality . . . unless these actions indicate his unfitness to teach.

After quoting extensively from *Morrison*, the court observed: "This view is in accord with the vast weight of contemporary judicial decisions."

Although, as the court conceded, neither the hearing panel nor the school board made a specific finding that the teacher's conduct had an adverse effect upon his ability to teach, the court upheld the dismissal. "We believe," said the court, "that necessarily implicit in the board's dismissal was the underlying premise that [the] conduct was job-related." The court then stated:

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[10] Weissman v. Board of Educ., 547 P.2d 1267 (Colo. 1976).

> In our view, whenever a male engages in sexually provocative or exploitive conduct with his minor female students a strong presumption of unfitness arises against the teacher.

In 1980, misconduct with students resulted in another Colorado case.[11] The conduct between the teacher and four of his female students occurred both inside and outside of school. Citing the findings, the court held: "The conduct found by the panel furnishes a factual warrant for the Board's ultimate finding of 'immorality indicating unfitness to teach.'" Again, the Colorado court rejected a teacher's argument that under the circumstances described a specific finding of unfitness was required.

One of the most recent dismissal cases involving misconduct with students was decided by a Missouri appeals court.[12] Reversing the lower court, the appellate court found the evidence adequately supported discharge for immorality based on the following charges:

> (1) While conducting a carpentry class on or about October 12 or 13, the teacher permitted the only female student of the class to be harassed by the male students with questions of how much money she would take for sexual favors; and when she, in exasperation, replied $150.00, the teacher took out two $100.00 bills from his billfold and offered them to her.
>
> (2) In the month preceding the hearing, the teacher, while alone with the female, grabbed her, hugged her, put his arm around her, and pinched her.
>
> (3) About a month prior to the hearing, the teacher permitted a centerfold from Playboy magazine to remain on the wall of the classroom in full view of the students in his class, then let it be taken to a carpentry job site away from the school.
>
> (4) At various times, the teacher permitted, in his presence, male students to subject the female student to sexual harassment.
>
> (5) In September, 1979, while the teacher was present, male students handed the female student a plastic substance in the form of a phallus, which was also displayed in a sexually suggestive manner by one of the male students to the female student. This object was later discovered by the female student in her work pouch. The teacher displayed the plastic phallus to other teachers and treated the matter as a joke, and at no time took any action to indicate his disapproval of such to the class.

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[11] Ricci v. Davis, 627 P.2d 1112 (Colo. 1980).

[12] Ross v. Board of Educ. of Moberly School Dist., No. WD 32540 (Mo. Ct. App. 1982).

The lower court had overturned the discharge on procedural grounds, inappropriately applying the state's administrative procedures act to this situation.

Other Sexual Conduct

The most frequent types of situations involving heterosexual conduct between consenting adults that result in dismissal actions are cohabitation and pregnancy out of wedlock. Although as recently as 1976 a board successfully defended its actions, the facts were perhaps so unique that few generalizations are possible. In *Sullivan v. Meade Independent School District*,[13] the teacher who lived with her boyfriend in a mobile home furnished by the district, claimed her dismissal violated her constitutional rights of privacy. In affirming the district court's judgment, the Eighth Circuit Court said:

> [The] parameters of the newly evolving constitutional right to privacy are not yet clear. While the right of a couple to live together without benefit of matrimony eventually may be held to fall within the penumbra of the constitutional right to privacy, it had not been so held at the time the board dismissed the appellant. Thus, it cannot be said that the members of the school board either knew or reasonably should have known their actions would violate a constitutional right.

The case was dismissed for failure to state a proper claim for damages.

A recent Missouri case illustrates the evolving nature of the law in this area.[14] The teacher who brought the action sought preliminary and permanent injunctions to prevent the board from firing her on charges of immorality. In order to respond to the constitutional questions raised, the court found it necessary to construe the pertinent provisions of the state statutes.

The plaintiff, a tenured second grade teacher, had taught in the district eleven years. According to her testimony in June 1979 she began dating her present husband. Shortly thereafter his ex-wife came to the plaintiff's house where they were having dinner. An argument insued and the sheriff was called. The man moved in with the plaintiff in September of that year. On November 14, the school principal asked her to sign a statement on her performance evaluation form that she was living with a man to whom she was not married but intended to marry in the near future. The following day school officials asked her to resign, with the threat that they would fire her and recommend that her certificate be revoked if she did not. On November 19 she married the man and so informed the board. The next day school officials suspended her with pay, brought charges of "immoral conduct" against her and informed her of a right to a hearing before the board.

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[13] Sullivan v. Meade Indep. School Dist., 530 F.2d 799 (8th Cir. 1976).

[14] Thompson v. Southwest School Dist., 403 F. Supp. 1170 (W.D. Mo. 1980).

The teacher filed this civil rights action and on December 21 the court issued a temporary restraining order enjoining the board from its intended action. The court set proceeding to determine whether the preliminary injunction should be issued. In order to examine the teacher's allegation that the ground is "unconstitutionally vague," the court found it necessary to construe provisions of the state tenure law listing grounds for dismissal.

> If the term "immoral conduct" is considered not in the abstract but in the overall context of (the statute), it is clear that the legislature intended to allow dismissal only in instances where immoral conduct adversely affected a teacher's performance.

The court went on to point out that the other statutory grounds were each related to teaching performance. The court supported its conclusions in this regard by citing and quoting extensively from several of the cases previously discussed.

Having established the nexus requirement, the court then looked to see whether the board had met its burden of showing adverse impact. The court finding none alluded specifically to the absence of evidence concerning disciplinary problems in the classroom and "hostile atmosphere undermining her authority." Since the board did not respond to the court's invitation to submit additional evidence within thirty days the injunction reinstating the teacher became permanent.

In the *Thompson* case, the teacher also claimed substantive due process violations. Noting that the teacher was tenured, the court reasoned that she had a *property interest* in continued employment protected by both *procedural* and *substantive* due process. The court noted that the teacher could successfully argue then that her dismissal would be arbitrary and capricious if "each of the stated reasons is trivial, or is unrelated to the educational process or to working relationships, or is wholly unsupported by a basis in fact." Since the board failed to establish a nexus between her conduct and fitness to teach, the teacher had met that burden. The court found that the plaintiff demonstrated "sufficiently serious questions going to the merits of her substantive due process claim so as to make this fair issue for litigation." This finding provided one of the necessary elements for granting the requested injunction preventing the teacher's dismissal.

For various reasons, dismissal of unmarried pregnant teachers have been consistently overturned in decisions by courts-of-record,[15] but in only a few instances have the courts declared pregnancy out of wedlock to be constitutionally protected. The first such ruling was *Drake v. Covington City Board of Education*[16] and the most recent and authoritative decision to date is *Avery v. Homewood City Board of Education,*[17] in which the Fifth Circuit Court takes a rather novel approach to the issue.

In *Drake*, a divided three judge panel of an Alabama federal district court held in 1974 that a teacher had been dismissed for constitutionally impermissible reasons. The plaintiff's dismissal followed an investigation by the county superintendent of schools precipitated by rumors that the teacher was hospitalized and pregnant. When the superintendent called the physician who ran the facility, he received confirmation that the allegations were true. The teacher had entered the hospital for an abortion but was still pregnant when released (apparently because she was in the second trimester of pregnancy). The board then charged her with immorality and scheduled a termination hearing. Introduced in evidence was a signed statement by the doctor certifying that the teacher was pregnant. Also, in response to questioning, the teacher admitted having sexual relations with her fiance. On the basis of this evidence, the board voted to fire her. The State Tenure Commission sustained the board's decision, and the teacher filed this civil rights action.

In the majority opinion supporting the teacher, the judge first reviewed the constitutional basis for privacy rights. He then quoted *Eisenstadt v. Baird* [405 U.S. 438 (1972)] in holding that privacy in sexual matters is *not* restricted to married couples:

> [I]f the right of privacy means anything, it is the right of the individual, married *or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as deciding whether to bear or beget a child. (Emphasis added.)

Thus, the judge assumed that this teacher's conduct was constitutionally protected.

Whether the "intrusion" is warranted or unwarranted (when the conduct is constitutionally protected) depends on the presence of a "compelling interest." According to the court, since the board had failed to establish a nexus (connection) between the teacher's conduct and her fitness to teach, no compelling state interest had been shown. Therefore, the majority concluded that the dismissal based on evidence obtained through consultation with the teacher's physician was an unconstitutional invasion of her right of privacy.

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[15] Brown v. Bathke, 416 F. Supp. 1194 (D. Neb. 1976), *rev'd on other grounds*, 566 F.2d 588 (8th Cir. 1977).

[16] Drake v. Covington City Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974).

[17] Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982).

The facts of *Avery* were somewhat similar to those of *Drake* in that a pregnant unmarried teacher was dismissed on charges that included immorality. However, the charges also cited grounds of "insubordination" and "neglect of duty" based on her failure to notify the administration of her condition no later than the fourth month of pregnancy as required by board policy. She filed this civil rights action alleging violation of various statutory and constitutional rights. While noting that a discharge based on charges of immorality "might" be unconstitutional, the federal district court found it unnecessary to reach that question. Instead, the court upheld the discharge on the basis of the permissible reasons stemming from the teacher's failure to comply with school rules. Avery appealed.

Holding for the teacher, the Fifth Circuit Court ruled that the lower court's judgment "contravened the standard of proof and causation mandated by the Supreme Court for mixed-motive discharge cases" as outlined in *Mt. Healthy City School District v. Doyle* [429 U.S. 274 (1972)]. The appellate court pointed out that according to *Mt. Healthy* the burden was initially on the teacher to show that her conduct was constitutionally protected and was a motivating factor in her discharge. The Fifth Circuit Court at this point said: "We assume, *arguendo*, that Avery's out of wedlock pregnancy was constitutionally protected." Continuing the court concluded:

> Having found Avery had carried her initial burden, the district court should have gone on to determine whether the appellees have proven by a preponderance of evidence that they would have discharged Avery even in the absence of her out of wedlock pregnancy. Since the court instead held that the other, unchallenged ground for Avery's dismissal rendered the Board's decision lawful, the district court's judgment must be vacated.

On the basis of the record, the appellate court, convinced that the trial court could not "permissibly" find that the board proved by a preponderance that it would have discharged the teacher solely for failing to comply with the notice rule, declined to remand the case for such a determination.

The court then observed that "the only remaining question is whether discharge on account of pregnancy out of wedlock is . . .

unlawful." The imposition of the *Mt. Healthy* analysis would lead one to expect the court to declare that a violation of privacy right had occurred as proclaimed in *Drake*. The court held that Avery's discharge violated her rights under the equal protection clause. The case was remanded to the lower court to determine appropriate relief.

ILLEGAL CONDUCT

There is obvious overlap between the categories of immoral conduct and that of illegal conduct. Furthermore, in both instances the ground cited for terminating the teacher's contract quite probably will be "immorality" or "immoral conduct" depending on the wording of the statute.

Drug Violations

With problems of drug abuse among school children becoming almost commonplace, one might expect the courts to view teacher conduct involving the sale and use of illegal drugs, perhaps even the possession, as good cause for dismissal. However, as the case law has developed in some states the argument that proof of the conduct provides the needed evidence of unfitness was rejected.

In 1972 the California appellate court heard appeals from lower court decisions sustaining disciplinary action against two teachers each convicted of possession of marijuana.[18] The judge, considering these appeals together, in each instance examined the record for evidence that the conduct rendered the teacher unfit to teach. Noting, among other things, that the evidence did not even indicate "whether or where the first teacher taught, thus precluding inference as to the relevant notoriety of his conduct," the court reversed the lower court judgment for the state board. The revocation of the teaching certificate was not permitted to stand. On the other hand, the court affirmed the decision in the second case finding sufficient evidence of unfitness. This evidence consisted of a vice-principal's testimony and the notoriety of the incident among students, teachers, parents and others. Thus the board had acted legally in dismissing the teacher.

In a Pennsylvania case, the Commonwealth Court considered a school board's appeal from a decision of the state secretary of education ordering the reinstatement of a teacher.[19] The court listed the dates and significant events leading to this appeal: (1) June 24, 1977, the teacher entered a plea of *nolo contendere* to a charge of possession of marijuana and was placed on one year probation; (2) September 26, 1977, the board suspended the teacher; (3) March 16, 1978, the board dismissed the teacher; (4) July 6, 1978, the teacher's record of arrest and prosecution was expunged; (5) July 7, 1978, the teacher had a hearing before an examiner appointed by the Secretary of Education; and (6) June 8, 1979, the decision of the Secretary was filed.

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[18] Comings v. State Bd. of Educ., *appeal heard with* Jefferson Union High School Dist. v. Jones, 100 Cal. Rptr. 73 (Cal. Ct. App. 1972).

[19] Warren Cty. School Dist. v. Carlson, 418 A.2d 811 (Pa. Commw. Ct. 1980).

The court observed that possession of marijuana would support the board's charge of immoral conduct and justify dismissal. However, the only evidence of this offense was the *nolo contendere* plea. Even so, the court had previously held that such a plea is admissible in an administrative proceeding. Nonetheless, that court distinguished the present case on the basis of specific statutory provisions.

When this dispute came before the Secretary, the "ultimate fact finder," the criminal record has been expunged. Since there was no criminal record before him, the Secretary correctly concluded that no evidence supported the charge of immorality. The court ordered the teacher reinstated with full back pay.

In a 1981 case, *Chicago Board of Education v. Payne,*[20] an Illinois appellate court held that a school board had acted within its discretion in dismissing a teacher convicted of illegal possession of marijuana. The conviction followed an incident in which the teacher inadvertently removed the bag from his pocket while searching for his driver's license after being stopped by a policeman for a traffic violation. The court was convinced that the required nexus had been established by evidence that a teacher's possession, once it became a matter of general knowledge, would have an adverse impact upon that teacher's students and fellow teachers.

Shoplifting and Theft

In recent years a number of teachers have challenged their dismissals resulting from incidences of shoplifting. In the *Gillete* case,[21] the evidence indicated that the teacher took two articles from the Gibson store and an article from the Safeway store both in Nebraska. In response to those charges the teacher's psychiatrist testified that she had a metabolism disorder triggered by certain foods which altered her state of consciousness and at the time she was unable to control her actions. Other evidence was introduced pertaining to the supplemental reasons. The hearing committee in a split vote found for the teacher concluding that the board had failed to show that the pending charges had any "harmful effects" on the community. The committee with such a finding is obviously imposing the nexus requirement.

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[20] Chicago Bd. of Educ. v. Payne, 430 N.E.2d 310 (Ill. Ct. App. 1981).

[21] Gillette v. Unified School Dist. No. 276, 605 P.2d 105 (Kan. 1980).

The Kansas Supreme Court in considering the board's appeal first reviewed the legislative history of the dismissal statutes. Turning to the definition of "good cause," the court cited a Massachusetts decision which said "any ground which is put forward by the (board) which is not arbitrary, irrational, unreasonable, or irrelevant to . . . building up and maintaining an efficient school system." The Kansas court assuming that the primary responsibility for determining good cause rests with the school board upheld the discharge.

The West Virginia Supreme Court last year expressed a different point-of-view.[22] The court overturned a school counselor's dismissal on charges of immorality holding that a *nolo contendere* plea to the charge of shoplifting did not show the required nexus to job performance.

A Delaware teacher failed in his attempt to use the nexus rationale to get his discharge overturned as not supported by substantial evidence.[23] The board had charged the teacher with immorality based on his convictions of the following criminal offenses: felonious restraint and aggravated assault, theft, and violation of the Uniform Firearms Act. In the termination hearing, the board not only received the evidence transcripts of these convictions but heard testimony from the victim as follows:

> [S]he had just returned to her car in the parking lot of a food market . . . when the defendant got in with a gun and locked the door; she screamed and the appellant said, "Shut up or I'll kill you;" she started to cry and he said, "There is no need to be afraid, just do what I tell you and you won't get hurt;" he asked her age, told her to try to relax, and said that he just wanted to talk with her; he was stroking the side of her head and holding the gun barrel at her neck; he told her to turn off the car; he then put a baby food jar on the dashboard and told her that it was going to make her relax; he took off the lid and there was an odor and her eyes started stinging; he kept trying to force a cloth with the liquid over her mouth and nose; she screamed and struggled; while in a semi-conscious state, she heard the keys being taken from the ignition of the car, something being done with her pocketbook and the car doors being opened; she was able to unlock the door and get free; the appellant fled.

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[22] Golden v. Board of Educ. of City of Harrison, 285 S.E.2d 665 (W. Va. 1981).

[23] Skripchuk v. Austin, 379 A.2d 1142 (Del. Super. Ct. 1977).

The teacher, however, argued that his effectiveness as a teacher remained unimpaired. He completed the school year while the charges were pending and was named outstanding industrial arts teacher in the state. A social worker and psychologist who counseled him indicated that similar incidents were unlikely to happen. The teacher attributed the acts to unusual pressures. He further argued that the board's permitting him to continue teaching while charges were pending evidenced their feelings that he was not dangerous. Few people knew of the incident until the report of his guilty plea appeared in the local newspaper. As indicated, the court rejected this argument based on the nature of the offense and testimony of school administrators that "the convictions would make parents fearful and would impair the appellant's effectiveness as a teacher, particularly in the areas of guidance and discipline.

In 1980, the Washington Supreme Court once again reviewed the dismissal case in which the school allegedly failed to establish the required nexus.[24] The reason for the discharge was that the teacher had been convicted of grand larceny by possession for having purchased a stolen motorcycle. The teacher elected to appeal directly to the trial court rather than participate in a hearing before the board. This alternative was provided by state law. After an adverse ruling, the teacher appealed to the state appellate court. That court held that the trial court had erred in finding that the felony conviction was inherently harmful to the teacher-pupil relationship and in granting the board's motion for summary judgment.

Affirming the determination of the appellate court, the state supreme court's majority accepted the holding that "cause" for dismissal requires a showing of adverse impact on teaching performance. The case was returned to the trial court for a full evidentiary hearing. The high court noted that the evidence was conflicting as to whether the teacher knew the motorcycle was stolen and that there was some evidence that he had performed competently in the classroom after the conviction.

Other Illegal Activity

The final grouping of cases are referred to as other illegal activity. In 1976, a Montana school board sent a "letter of dismissal" to one of its teachers citing as reasons for dismissal the teachers' convictions on charges of driving while intoxicated and driving without a valid driver's license. The teacher responded with a proposal under which he would keep his job but the board rejected it and scheduled a termination hearing. Five days prior to his hearing, the board's chairman sent the teacher an amended letter of dismissal listing additional charges. After the hearing resulting in his discharge, the teacher pursued without success the administrative and judicial appeal process to the state supreme court. The Montana Supreme Court first found that, under statutory procedures, the only valid charges against the teacher were those contained in the first letter of dismissal.[25] The court concluded that absent a showing that the conduct adversely affected teaching performance the discharge was a breach of the teacher's contract.

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[24] Hoagland v. Mount Vernon School Dist., 285 S.E.2d 665 (W. Va. 1981).

Nolo Contendere

Nolo contendere pleas may in some states provide the required evidence to support a dismissal. In the *Baker*[26] case the plea came in response to charges of operating an illegal gambling business. Since that state adheres to the exemplar requirement as expressed in *Horosko*, the court accepted the evidence as sufficient to support the immorality charge.

The final case to be examined was decided by a California appellate court in 1980.[27] The plaintiff was a special education teacher against whom dismissal proceedings were commenced because of an incident during a teachers' strike. He had telephoned the Public Safety Department and falsely reported that an explosive device had been planted in the school. The reason given for this act was that it was to obtain an accurate count of the students to refute enrollment figures announced by the district. By revealing this information, he sought to pressure the district into "negotiating more earnestly." He was charged in a felony complaint, arrested and later entered a *nolo contendere* plea to a misdemeanor charge. A six months jail sentence was suspended except for ten days, seven of which he served.

The initial proceeding conducted by the Commission on Professional Competence resulted in a finding that the teacher should be retained in his position. Subsequently, the board petitioned the superior court for a writ overturning the Commission's order. After an independent review, the trial court, holding that the board failed to demonstrate the teacher's unfitness, ordered reinstatement, and awarded him $7,232.64 in costs. The appellate court affirmed this determination in full.

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[25] Lingren v. Board of Trustees, 558 P.2d 468 (Mont. 1976).

[26] Baker v. School Dist. of Cty. of Allentown, 371 A.2d 1028 (Pa. Commw. Ct. 1977).

[27] Board of Educ. of Sunnyvale Elem. School Dist. v. Commission on Professional Competence, 162 Cal. Rptr. 590 (Cal. Ct. App. 1980).

SUMMARY AND IMPLICATIONS

With the exception of misconduct with students or other minor children and most heinous crimes, immoral and illegal conduct must be shown to adversely affect job performance in order for the courts of most jurisdictions to sustain the teacher's discharge. Failure on the part of school officials to establish that nexus may be viewed as violative of fourteenth amendment substantive due process. It seems unlikely at this time that any additional states will have statutory grounds for dismissal declared unconstitutionally vague. The courts have avoided such challenges by construing the statute to require the nexus or by citing common law definitions. Finally where the courts have declared the conduct constitutionally protected either by rights of privacy or equal protection, school officials must show a compelling state interest for their action or prove by a preponderance of evidence that they would have dismissed the teacher for constitutionally permissible reasons.

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The Federal Regulatory Process: An Overview and Prognosis

ROGER TILLES

Roger Tilles received his J.D. from the University of Michigan, College of Law, Ann Arbor, Michigan. He is an attorney actively practicing law in the field of education, chiefly specializing and advising in educational legislation. He has written and spoken at conferences and seminars and is one of the few who qualify as an expert in education, law and legislation.

In the mid-1960's, when Great Society money was initially flowing from Washington in unprecedented amounts, education regulation writers didn't have time to follow the time consuming and complicated process of issuing detailed rules before sending money to states and cities to get new programs started. Instead, the agency simply issued guidelines telling school officials what the money was for and how it should be spent, allowing little input from potential recipients. Agency officials said they were too busy giving away money to go through the full regulatory process. Realizing things were getting out of control, Congress passed the General Education Provisions Act (GEPA)[1] in 1968 to force the then Office of Education to follow standard procedures for regulatory promulgation. GEPA was created to take into consideration the specific concerns of education as they relate to the federal regulatory process. It replaces in the Education Department the more general Administrative Procedures Act which governs other agencies of government. GEPA was created, of course, to solve problems, but it has created problems of its own, including enforcement problems, turf battles and mountains of regulations.

The man who has been in charge of writing education regulations for the past 11 years, Neal Shedd, now is overseeing the major revamping of that mountain of material, a review and revision he says is absolutely necessary. "The government has 21 million rules, regulations, ordinances, directives and orders on the books to enforce the Ten Commandments," he has said.[2] His message, quite clearly, is that consolidation is needed.

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[1] Title IV of Pub. L. No. 90-247 (*as amended by* Pub. L. No. 91-230, Pub. L. No. 92-318, Pub. L. No. 93-380, Pub. L. No. 94-482, Pub. L. No. 95-561 and Pub. L. No. 96-46). Referred to throughout as GEPA Section.

One example: "Several years ago, Congress passed legislation giving the Office of Education money to seek out young people who were bright and clearly had potential, but who for some reason had dropped out of the education system. School districts were anxious to get that money, and some inventive upstate New Yorkers headed straight for the Bronx to find candidates. The Office of Education found out about this, of course, and wrote a rule designed to stop it by prohibiting districts from importing students more than 75 miles away. Then it started getting mail from Montana and Wyoming with complaints that 75 miles is nothing to them and they have to go at least that far to reach kids. So the Office of Education re-wrote the rule, allowing special exceptions. It was a never ending process to make everyone happy."[3]

After 11 years of devising what some call a Rube Goldberg collection of regulations, Neal Shedd and his staff in the Education Department are reviewing every education rule on the books to determine if it is necessary, justified by law, and can be met without undue expense and paperwork. This is making a lot of educators very nervous. While many officials inside and outside government are aware of the need to review and revise education's body of regulation, such changes are threatening to many who were instrumental in passing laws and writing rules to achieve social goals. Some believe the Reagan administration is putting on a show of regulatory reform, enunciating lofty goals of trying to return more authority to local districts while secretly trying to undo decades of social progress. They use as an example the recent controversy over regulations for the Education for All Handicapped Children Act of 1975, P.L. 94-142. These regulations are among those that have gone through Shedd's regulatory rewrite mill in an effort to streamline them and return decision-making to local and state governments. Education Secretary Terrel Bell, bowing to public pressure, has withdrawn six of those proposed new rules after a storm of criticism from parents and teachers that the changes could hurt students. "We were, in fact, handing the discretion to local school boards, and parents weren't ready to do that," Secretary Bell said concerning a particularly irksome proposal.[4] Representative George Miller, a California Democrat urged Bell to withdraw the whole set of proposed rules, not just the controversial six. "Before this law, these wonderful local people on the school boards were locking these children up in basements and closets," Miller said. "Rights were vested in the states before this law, and they didn't do a damn thing for these students."[5] Miller and others like him are worried that a return of too much local control through regulatory reform will turn back the clock on progress in education as local school boards opt for saving money over helping disadvantaged, handicapped or other special students.

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[2] Interview with Neal Shedd by Grace-Marie Arnett (Oct. 1, 1982).

[3] Interview with Neal Shedd by Grace-Marie Arnett (Oct. 1, 1982).

[4] Testimony of Secretary Terrel Bell at hearing of House Education and Labor Committee (Sept. 29, 1982).

As this controversy rages in Washington over regulatory reform, local school boards are understandably nervous about how these changes will affect them. This article will attempt to explain this regulatory maze and present the players involved, explain some of the turf battles over control of the regulatory process, show how the process should in theory work and where some of its pitfalls are, and hopefully give officials enough information to help protect their own districts.

THE PROCESS

Once the bill is introduced it must work its way through the legislative mill, first being considered by the subcommittee that likely drafted it. A piece of proposed legislation may actually be conceived with subcommittee staffers and agency officials working together to draft a bill. Hearings will be conducted and a vote eventually will be taken on whether to submit it to the full committee for action. If it passes and the full committee approves the bill, often after conducting its own hearings, it eventually will be referred to the full House or Senate for consideration and then through the opposite chamber before signature of the President. If it passes and if money is required to carry out the functions of the program, which is most often, the measure must then go through the entire process again, through the relevant appropriations subcommittee, full appropriations committee and again to the floor of both bodies for a vote and presidential signature.

It is a complex process and only a small percentage of the bills introduced in Congress ever complete this cycle to become law. But that is not the end of the work. Once the bill becomes law, it is up to the administration to actually create the program and spend the money to get it going and keep it operating. Enter the regulator process.

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[5] Comment by Representative George Miller at Hearing of House Education and Labor Committee (Sept. 29, 1982).

By law, an agency has 240 days after passage of a statute before the final rule must be in place.[6] When the statute is first received by the Education Department, it is immediately routed to the Division of Regulations Management (DORM) in the Office of the General Counsel which is responsible for coordinating and developing all regulatory documents in the Education Department (ED). Officials there will set up a schedule in conjunction with the appropriate program office in ED for drafting the proposed rule and other appropriate documents.

The actual responsibility for drafting the rule falls on the appropriate program office which will be assisted by an attorney from the Office of the General Counsel assigned to help draft the rule.

Once the General Counsel's office attorney and the program office officials have completed their draft of the proposed new rule, the internal review process begins. Copies of the rule are distributed to DORM, the General Counsel, the Offices of Planning, Budget and Evaluation, Intergovernmental and Interagency Affairs, the Inspector General, the Executive Secretariat, the Under Secretary, and to any other office or official, on an ad hoc basis, that might be affected or have an interest in the rule, *e.g.*, the Office of Civil Rights.

These offices will have from a few days to several weeks to review the proposed new rule and prepare their comments and objections. These intra-departmental comments are collected by DORM and returned to the program office that originally wrote the rule. If the rule is especially controversial or complex, the program office may be required to redraft the rule again and ask for a second round of comments. This cycle may be repeated several times during which internal meetings likely will be held to review the conflicts and objections of various offices. If the conflicts cannot be reconciled internally, the Secretary may be called on to mediate and resolve the difficult issue(s). Once the rule has been tailored to the satisfaction of all the various offices in the Department that have an interest in it, the rule is ready to be sent to the Executive Secretariat for approval and to the Secretary for signature.

OFFICE OF MANAGEMENT AND BUDGET REVIEW

The Reagan administration has required all proposed regulations to be submitted to the Office of Management and Budget (OMB) for review before they are signed by the Secretary and published.[7] One of the major aspects of this review was to have been to establish cost-benefit analysis, a cornerstone of the administration's regulatory reform. An action, however, challenging aspects of this blanket across the board cost-benefit analysis was recently brought by textile manufacturers in *American Textile Manufacturers Institute v. Donovan.*[8] Plaintiffs complained that the Occupational Safety and Health Administration was wrong in refusing to engage in cost-benefit analysis. The court of appeals rejected the petitioners' claim, however, holding that agencies are not required to compare costs and benefits. The Supreme Court affirmed. In the clarifying case, as the Court saw it, Congress in the passage of the specific legislation, "itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable. Any standard based on a balancing of costs and benefits by the Secretary . . . strikes a different balance than struck by Congress."[9] This aspect of the Reagan approach to regulatory reform, then, would seem to be one where challenge will prove successful.

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[6] GEPA § 431(g).

[7] Exec. Order No. 12291, 46 Fed. Reg. 13192 (1981).

This OMB review may be conducted simultaneously with the intra-departmental review. Most often, however, the rule is sent to OMB after the internal ED consideration is completed.

If OMB objects to all or parts of the draft, generally because it conflicts with overall administration goals or principles, the rule will be returned to ED for redrafting, incorporating OMB's objections. The internal review cycle must, of course, be completed again before the redraft is returned to OMB. If OMB has no objections, however, the Secretary will sign the document and it will be published in the Federal Register within three to five days as an official Notice of Proposed Rule Making (NPRM).

COMMENT PERIOD

The public will be given between 30 and 120 days to comment on the proposed rule; most often, a 45-60 day period is allowed with more time given for more controversial rules and less for simpler ones.[10] If the proposed rule is especially significant, the Department may schedule public hearings to be conducted at one or several locations to take testimony. The process is expensive, however, and usually reserved for only the most controversial and significant issues.

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[8] 101 S. Ct. 2478 (1981).

[9] *Id.* at 2940.

[10] GEPA § 431 (b)(2)(A).

The comments, whether in oral testimony or most often, written form, are reviewed, analyzed and discussed within the Department. If the Department finds overwhelming opposition or objections to the rule, a nw NPRM likely will be drafted. Most often, however, only a few sections of the original draft are questioned. In those cases, the rest of the rule is left intact and the objectionable sections are separated and rewritten. The Education Department does not like to administer a program under a rule that has not completed the entire legal cycle, but there is a provision for an "interim final" that would be issued by ED to allow a program to be administered if the statute says it must go ahead by a certain time even if there are problems with some sections of the proposed rule. The interim final will be published in the Federal Register with an explanation and eventually will be replaced by a final rule.[11]

After the comments are reviewed and digested, ED will draft a proposed final rule that will be published in the Federal Register along with a "comment and response" section. All germane comments will be addressed, either explaining why the rule was not changed in response or pointing out the changes that were made. Once a rule is published, after undergoing a second review by OMB and receiving a second signature from the Secretary, it generally will take effect 45 days after publication, but could take effect immediately with the concurrence of the authorizing committees of Congress. During this time between publication and implementation, congressional review is required as the last step in the regulation formulation process under DEPA requirements.[12]

THE LEGISLATIVE VETO

Statutory provisions by which Congress authorizes a federal program to be administered by the Executive but retains the legal authority to disapprove all or part of the program before final implementation have become increasingly frequent in recent years. These statutory provisions which subject a variety of proposed executive actions to congressional review are commonly known as congressional or legislative veto devices. Although the constitutionality of the congressional veto is yet to be finally resolved by the Supreme Court, it has been the object of considerable discussion since the beginning of its use in the 1930s.

In most cases, congressional staff would have been consulted in the development of a rule to take their ideas into consideration. (It is illegal for the department to give draft copies of a proposed rule to anyone outside the department. If it happens, ED is required to publish in the Federal Register a notice that copies of the proposed rule are available to the public.) However, when there is a difference of opinion between the Congress and the Administration over a regulation that has not been resolved in the preparatory stages, a full-fledged veto fight is possible.

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[11] GEPA § 431(e).

[12] GEPA § 431(d).

The General Education Provisions Act became the focal point of a battle in August betwen the administration and Congress over two sets of education regulations. The United States Attorney General in 1980 had issued an opinion that the GEPA provision allowing for a two-house legislative veto is unconstitutional.[13] It has yet to be challenged. The Reagan administration has continued this course. In unanimous votes, Congress disapproved ED's final rules for the Education Consolidation and Improvement Act (ECIA), chapters 1 and 2, primarily because the legislators believed the department didn't pay homage to the provisions of GEPA that allows Congress the option of vetoing proposed regulations. More to assert its authority than as to make a statement on the content of the rules, both houses of Congress swiftly struck down the ECIA regulations.[14] The program is flowing even with the legislative veto of it, however. Since the states make most of the specific rules and provide the real foundations for the program, and most of the program in chapter 1 was already in place before the new law was enacted, it could be temporarily administered even within this storm over regulatory reform in Washington.

In the meantime, the Supreme Court is considering a case which could decide the constitutionality of the legislative veto.[15] The Court has scheduled arguments on December 7, 1982. Disputes over Congress' legislative veto authority continue, however.

On December 16, 1982, the United States District Court in Montana[16] held that section 204(e) of the Federal Land Policy and Management Act (43 U.S.C. § 1714(e)), authorizing a congressional committee to notify the Secretary of the Interior of an "emergency situation" regarding public lands and to direct him "immediately" to withdraw such lands from mineral leasing activities, is constitutional only if it is construed to allow the Secretary of the Interior to establish the scope and duration of such emergency withdrawals. On January 29, 1982, the United States Court of Appeals for the District of Columbia Circuit[17] unanimously held unconstitutional the "one-House" congressional veto provision, section 202(c) of the National Gas Policy Act of 1978 (15 U.S.C. § 3342(c)). This section authorized either House to disapprove incremental pricing rules issued by the commission. The United States Court of Appeals for the District of Columbia Circuit found that Congress violated "the principles of separation of powers established in . . . the Constitution" when it vetoed a rule last May.[18] The rule involved a Federal Trade Commission rule that would have required used-car dealers to give customers more information about the cars on their lots. It was the second time that the appeals court had declared the legislative veto illegal, finding that Congress had overstepped its legislative authority by barring an agency from issuing a regulation. It was the first decision to strike down a two-House veto like the GEPA provision for ED which required action by both the House and Senate to overturn an agency's rule. The earlier cases all involved a one-House veto. Until the Supreme Court decision is handed down, which will give guidance only on GEPA applicability, most school districts are following the lead of Clarence Wills, the director of chapter 1 programs in Michigan. He said his office has been advising districts to "stick closely" to the regulations that governed the old Title 1 program, which chapter 1 replaced, while Congress, the administration and the United States Supreme Court continue their battles. During the Carter administration, Congress vetoed four proposed regulations, eventually winning total or partial victories on all.

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[13] 43 Op. Att'y Gen. (June 5, 1980).

[14] H. Con. Res. 388, passed House of Representatives August 12, 1982, 363-0, passed Senate, August 13, 1982, by unanimous consent.

[15] Immigration and Naturalization Serv. v. Chadha, 634 F.2d 408 (9th Cir. 1980).

[16] Pacific Legal Found. v. Watt, 50 U.S.L.W. 2394 (U.S. Jan. 12, 1982).

It should be made clear that the failure of Congress to disapprove a regulation has been ruled to have no constructive effect of approving such regulations or giving any congressional finding of consistency with the act granting authority to promulgate the regulation.[19]

The legislative veto is a tool that is being wielded because of increasing friction between the legislative and administrative branches of government. If the administration and the Congress were of one mind as far as their missions were concerned, there would be little dispute about how to implement programs. But Congress, especially the House of Representatives, and the Reagan administration have seemingly different ideas about the role of government in society, especially in education, and a clash over the legislative veto is not surprising.

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[17] Consumer Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982).

[18] Consumers Union of the United States v. Federal Trade Comm'n, 691 F.2d 575 (D.C. Cir. 1982).

[19] Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

ALTERNATIVES TO LEGISLATIVE VETOES

While the veto is rarely used and its constitutionality remains in question, Congress nonetheless retains some control over regulations. Vehicles for congressional control range from very direct means, such as enactment of a statute to explicitly revoke a rule, to much more subtle techniques like offering guidance in a committee report as to what shape the committee "hopes" the final regulations will take. Many of these tactics have the effect of overturning rules or proposed rules, preventing their enforcement or impeding their promulgation.

The most controversial statutory mechanism for regulatory control, as stated above, is directly overturning or pre-empting a rule by statute. This vehicle is a strong-arm tactic that is seldom used but in fact is even more far-reaching than a legislative veto. While a legislative veto halts promulgation of a specific rule, it does not prevent later development of the same or a similar rule. A statutory override, however, is a permanent constraint that terminates agency rules immediately and precludes similar future efforts. This mechanism is used infrequently, however, because it requires the Congress to go through the entire legislative process, from subcommittee hearings to passage in both Houses and signature from the President.

Another mechanism is statutory modification in which Congress limits the jurisdiction of an administering agency. This may be done in a number of ways, from removing or transferring issues from the regulatory authority of a particular agency, to completely deregulating an area to dissolve the agency's authority. By taking jurisdiction away from an agency, for example, statutory modification effectively annuls rules and regulations affecting a certain area. One example is the Education Amendments of 1976 which exempted specific programs and activities from regulations promulgated under Title IX of the Education Amendments of 1972 regarding sex discrimination in education programs and activities receiving federal funds. Congress passed these amendments in 1976 to undo what it called an "unintended result" of the rules that impacted such activities as Boys and Girls State and Nation, father-son and mother-daughter activities and beauty-talent contestants scholarships. The amendments removed these specific areas from jurisdiction of the then Department of Health, Education and Welfare.

The third statutory mechanism to influence the regulatory process is through the appropriations process. Although this procedure requires a more difficult process of passage, it has been used to stop the flow of funds for a specific regulatory activity. The appropriations mechanism is a very effective means of wresting control. While agencies are able to use great amounts of discretion in interpreting ambiguous language in legislation, the dollar figures in appropriations bills represent explicit commands which cannot be modified or ignored without serious peril to the agency. On the negative side, however, the impact of this tactic is restricted to a specific budgetary cycle and must be re-enacted yearly to have permanent effect.

Another set of mechanisms in which Congress can exert control over regulations involves working with the agency during development. Agency prior considereation and review requirements and advance notification of Congress are examples of more subtle statutory authority. These are being used with increasing frequency as indirect ways of Congress influencing an entire set of regulations, rather than addressing specific rules in the categories described earlier.

> Reports on proposed legislation submitted by authorizing, appropriating and conference committees frequently contain language setting forth the intent, expectations and even the commands of the Congress with respect to the implementation of laws. These range in degree all the way from simple urging on the one hand to outright mandates on the other and usually include such phrases as "the committee wishes," "the committee intends," "the committee expects," and "the committee believes." While none of these have any legally binding effect unless they are merely repetitive of the law itself, close attention is paid to them by both the executive and judicial branches when questions arise about the exact meaning or application of a particular statute.[20]

COMPLIANCE

It is very rare for Congress to intervene in the regulatory process by utilizing the legislative veto. Let us, then, look at the general method of compliance with the vast majority of laws and rules that go into effect without the legislative veto battle.

The Education Department's Inspector General is consulted even while proposed regulations are being first written to make recommendations and assure the rule includes proper and enforceable controls. Once the program goes into effect, this office is charged with monitoring more than 100 programs that involve some 50,000 entities. Several institutional systems are built-in to monitor compliance, but it is obviously impossible for the Department to monitor all or even a significant percentage.

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[20] Senate Subcommittee on Oversight Procedures of the Committee on Government Operations, *Congressional Oversight: Methods and Techniques* 62 (1976).

Some programs, like student financial aid, are required to have audits every two years. These audits serve as a guide to test for compliance and if irregularities are discovered, a further investigation will be ordered. Also, state and local governmental units are in many instances required to conduct audits of their programs every two years. Irregularities may also be uncovered here. Third, the department conducts its own spot program, targeting between 150 and 200 programs a year for special audit. These generally come to the attention of the department either because they have a large amount of money for their programs or there are indications of problems uncovered by the staff administering the program either in Washington or in the field. About three-fourths of these audits undertaken by the Inspector General result in findings of deficiency, generally because of improper expenditures.

James Thomas is Inspector General of the Education Department, charged with conducting audits and investigations of all education programs. He may receive complaints from a Congressman who gets a letter from an angry constituent, from a newspaper article exposing misspent funds, from disgruntled program employees or any number of other sources. The Inspector General decides which have merit and which to investigate. This function has increased its importance as ED reduces its staff of program personnel and increases the audit function staff.

APPEALS

In the case of an audit, if school officials are found to be at fault, they can appeal to the Education Appeal Board, a body of from 15-30 appointees who usually sit in panels of three (although it could contain up to the entire 30 members) to review the auditor's findings.[21]

The Education Appeal Board may also hold hearings on the withholding of funds,[22] cease and desist orders,[23] or other proceedings designated by the Secretary. For greater protection from conflict of interest, no more than one-third of the board can be ED employees and no panel may include an individual who is professionally responsible for the matter assigned to the panel.

In the most usual case, where an agency receiving funds under an ED run program has failed to properly account for such funds, the audit determination will be sent and the agency given 30 days to make appeal to the board. In such appeals, the burden of proof will be on the agency to prove the expenditures are allowable.[24] During the pendency of appeal, no return of disputed funds can be required.[25] There is a bar on the recovery of funds from actions which took place more than five years before notification of the audit finding. Also, the secretary may choose not to require the return of misspent funds if less than $50,000, the illegal practice has been substantially corrected and the collection would not be "in the public interest."[26] If the alleged wrongdoing warrants it, the case may be referred to the United States Attorney for possible prosecution.

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[21] GEPA § 451.
[22] GEPA § 453.
[23] GEPA § 454.

In the normal course of events, the board will follow the procedures outlined in the regulations.[27] The board chairperson will then submit the decision to the ED Secretary. Each party has the opportunity to file comments and recommendations on the panel's decision with the board's chairperson within 15 calendar days of the date the party receives the panel's decision. The decision becomes the final decision of the secretary 60 calendar days after the date the agency receives the panel's decision, unless the secretary, for good cause shown, modifies or sets aside the panel's decision.[28] As in any court proceeding, the final judgment, called a memorandum of opinion, often clarifies the law or regulation and has precedent value. It is a conclusionary judgment that has the effect of law. It can, of course, be appealed to the United States Court of Appeals. The court must, however, uphold the board if the findings of fact are supported by substantial evidence.

Appeals decisions indicate certain defenses which agencies have sought to utilize. There are several cases which involve the retroactive use of the ED Appeals Board itself for violations which allegedly occurred before the board's establishment. While the board indicates it has no discretion to hear such arguments, the court has indicated receptiveness.[29] The issue has not yet been determined judicially and efforts have also been made, but at this time only unsuccessfully, to resolve the situation legislatively by explicitly waiving the EAB jurisdiction for years prior to 1978.

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24. *See*, Title I Hearing Board Notice § 4b, 34 Fed. Reg. No. 23002, *amended at* 41 Fed. Reg. No. 28568. *See also*, *In re* State of North Carolina (clarifying time period), No. 12-(27)-76 (May 15, 1978) (Prehearing Opinion and Order), *In re* State of Arizona, No. 2-(38)-78 (April 6, 1981).

25. GEPA § 452.

26. *Id.*

27. Fed. Reg. No. 22634 (April 3, 1980).

28. GEPA § 452(d), 453(d), 454(d).

29. *See*, *i.e.*, West Virginia v. Secretary of Educ., 667 F.2d 417 (4th Cir. 1981) which upheld the Board's jurisdiction *but cf.* State of New Jersey Dep't of Educ. v. Hufstedler, 662 F.2d 208 (3rd Cir. 1981).

Appellants frequently will claim that they received some guidance from a department official whose orders they say they were following before the audit and the complaint surfaced. It used to be clear that the government could not be estopped by incorrect administrative advice. There has been a recent trend established, however, that "in some cases hard and fast rules against the estoppel of government are neither fair nor constitutionally required."[30] This trend noted by the dissent was abruptly set back by the Court's decision in *Schweiker v. Hansen*,[31] a Social Security benefits case. The Court refused to estop the government where an eligible applicant had lost her benefits due to possibly erroneous replies by a governmental worker to questions from the applicant. Only some kind of more affirmative misconduct would suffice as an estoppel against government.[32] Thus even a field visit by a department official who signed off on a particular program probably would not be ample defense if a complaint is presented.

The attitudes of the board are, of course, of keen interest to those who need to make judgments at the local and state board levels. However, it is rare that there is a consistency within the various decision-making levels within ED. For example, top ED officials have said that they want to return decision-making authority to the state and local levels, giving them more room to interpret federal regulations to increase flexibility. But the appeal board officials, not all of whom share the administraton's philosophy, could be very strict with districts that used the flexibility to suit their own needs. It is easy to understand why local officials and attorneys would be worried. Auditors, for example, don't necessarily follow the same guidelines as the people who write the regulations. Superimposed on this is the layer of state school board input which often has its own interpretation of the regulations. And it is up to the local school board to decide to whom to listen.

"People are a little uncertain about how fair and consistent we will be," Shedd said. "I can only ask them to do the same thing we are doing with them: Trust us."[33] Because the top layer of government is composed of political appointees, however, local officials have reason to be wary. If program specifications are not spelled out in law, local officials may find that what satisfied one official or administration sends the next with an order to recover misspent funds. Others charge that if regulations are vague, the administration in power has more leverage to work its political will through the regulatory process. This, for example, is why many educators want the 94-142 regulations left alone by the Reagan administration for fear "idealogues" in ED will reverse progress in education in unwritten, almost invisible ways by manipulating the regulatory process.

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[30] 101 S. Ct. 1468, 1473 (1981) (Marshall, J. dissenting).

[31] 101 S. Ct. 1468 (1981).

[32] *See* United States v. Harvey, 661 F.2d 767 (9th Cir. 1981); United States v. Ruby, 598 F.2d 697 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

[33] Interview with Neal Shedd by Grace-Marie Arnett (Oct. 1, 1982).

REGULATORY REFORM

While both the administration and many members of Congress want to impose new checks on the regulatory agencies, both sides want to reserve the new power for themselves. To that end, Congress is considering a number of bills on regulatory reform.

While regulatory reform legislation is being considered by Congress, ED and other governmental agencies are involved in a process of reviewing and revising regulations under the provisions of Executive Order 12291. Mr. Reagan's executive order is the centerpiece of the administration's effort at regulatory reform. It requires a regulatory impact analysis calling for a statement of need for the rule, an examination of alternative approaches, a cost-benefit analysis and a line by line justification of statutory authority for the rule. It also established the task force on regulatory relief headed by Vice-President Bush and requires agencies to submit rules to OMB for review before they are promulgated. One proposed set of regulations stopped in its tracks by this order governed bilingual education. Before leaving office, the Carter administration proposed rules ordering school districts to provide special language instruction to children of limited or no English speaking ability. The Reagan administration said this rule was "unnecessarily and inappropriately intrusive" and pulled it back before it could go into effect. Critics of the rule have charged the Carter administration was writing the rule without statutory authority and was essentially taking from Congress its policy-making authority.

Critics of the Reagan administration's executive order charge this allows an unacceptable politicization of the regulatory process. They charge the order has created a secret conduit through which lobbyists can funnel their complaints about regulations to agency heads, especially to the Office of Management and Budget, with the White House stamp of approval. The executive order "has opened the way for unprecedented interference by special interest in the federal regulatory process and created the potential for corruption," the Alliance for Justice, a group of 18 public-interest lobbyists and lawyers, has charged. The crux of the debate is whether Reagan's order subverts the Administrative Procedures Act, the federal regulator's bible, or GEPA.

The act places rule-making powers squarely in the hands of agency heads and requires that new regulations be based only on information in an agency's public record. If Mr. Reagan's order does not break those guidelines, it bends them. The order requires agencies to submit all proposed rules to OMB for review before they are made public. If a rule fails the review, it is returned to the agency for reworking, or often, for a quiet death. The Office of Management and Budget already has a great amount of power in the executive branch, particularly in this administration. To enact regulatory reform legislation which would grant OMB statutory authority to conduct such a review would lead to a tremendous centralization of power. It will also tend to confuse and dim the input of the public, such as local school board officials, who seldom have the money or the influence to enter the secret OMB corridors where these make or break regulatory decisions can be made.

DEREGULATION

Another aspect of the Reagan approach to rulemaking is the deregulation process by which all ED rules are reviewed with an eye toward elimination or modification to: (1) reduce paperwork requirements; (2) reduce regulatory burdens; (3) reduce compliance requirements; (4) eliminate unnecessary and highly prescriptive requirements; (5) provide greater latitude to applicants; and (6) save money.

Once a final rule is on the books, the general counsel and the program office may meet to review the rule with the above considerations in mind. They likely will have one of three goals: (1) Ideological interests in changing rule or regulation; (2) Political purposes for deregulating; and (3) An effort to improve the rule to better serve the public by eliminating excessive burdens, providing ample guidance for the public and providing cleaner, more precise language. A review may find, for example, there is no statutory basis for a regulation or section of a rule and decide to eliminate it. Also, a portion may have been left out of the rule that officials believe should be incorporated in the rewrite.

Should this deregulation process be undertaken, the entire intra-agency and public review cycle must be repeated. The Reagan administration is undertaking a systematic review of all regulations on the books, blocking out entire sections, for example, because officials believe they have no statutory authority or legislative history to back them up.

In these cases, the general counsel, the program office staff and other interested relevant officers will discuss changes and prepare a proposed re-write of the regulation. When this draft is completed, it must go through the process described earlier in this article. When the NPRM is submitted to the Federal Register, the preamble must contain a section describing what has been deleted and why and what has been left in and why. Again, the rule must be re-drafted to meet the needs and objections of all offices in the department, it must be approved by the secretary and the OMB, and must be presented to the public for a comment period. The comments will be reviewed, considered and possibly incorporated into the final document.

In order to gain more control over this process of deregulation, Congress has been trying for several years to draft comprehensive legislation.[34] The proposals share many important features. They would formally grant the president the power to place procedural controls over executive agency rule-making, powers President Reagan now exercises through the Office of Management and Budget by executive order. Bills also would require agencies to consider the costs and benefits of new regulations and to explain in some form why a new rule is or is not cost-effective. They would fine-tune the process by which judges hear challenges to regulations. The controversial features of the legislation are those that would broaden Presidential or congressional authority beyond current limits.

The bills being considered now by Congress probably will not be voted on during the 1982 Lame-Duck session. However, Mr. Reagan has been exercising much of the power those bills would grant through Executive Order No. 12291 issued on February 17, 1981.

While the concept of regulatory reform is enormously popular with the electorate, the specifics of how to go about it have ensnarled proposals in the legislative maze. Most observers contend that voting against the idea of regulatory reform could be so unpopular politically that the bill will pass if it gets to a vote in the Lame-Duck session. Some of those who have spent years working on the reform legislation are worried that if it doesn't get through this session, Congress may give it up. One problem is a philosophical one: The Reagan administration came into office promising to return more governing authority to state and local governments and purports to do that by rewriting mountains of regulations. At the same time, Congress is trying to wrest control over the regulatory process to make sure its legislative will is carried out. The clash over regulatory reform is not just a dispute over pieces of legislation and their provisions, but is actually a major struggle over where the power of government will reside.

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[34] *See especially* S. Rep. No. 1080, H.R. 746 97th Cong.

While legislation seems stalled, other steps already have been taken to alter the regulatory process. The Regulatory Flexibility Act[35] was passed September 19, 1980 to lighten the regulatory burden on small businesses, small organizations and small governmental jurisdictions. The Paper Work Reduction Act[36] was also passed last session. The purpose of the act is "to reduce paperwork and enhance the economy and efficiency of the government and the private sector by improving Federal information policy and for other purposes." The Education Department has been criticized by the General Accounting Office for failing to fulfill its legal obligations to reduce paperwork burdens on states and school systems. In a study issued earlier this year, the GAO criticized the department for failure to comply with a requirement that assures state and local officials are to be given seven months notice of paperwork requirements for ED requests for program monitoring information. Further, the GAO criticized ED for curtailing the activities of a commission set up by the Congress to review education-related paperwork requirements and to recommend ways of reducing the number of federal forms. The commission, known as the Federal Education Data Acquisition Council, has not held a meeting since 1979, the GAO found. Because ED failed to publish on time the requirements for filling out grant forms, the GAO said applicants were forced to fill out additional forms that amounted to approximately one million extra hours of work by recipients of federal aid.

CONCLUSION

The courts, of course, ultimately will be called on to resolve many of these battles between Congress and the White House, and the Agency and the local agencies. In the meantime, local and state school officials are caught in the cross-fire. I would advise careful attention to the political tensions between and within Congress and the administration, which you can monitor through representatives in Washington who advise your state departments or your own districts. And I would advise caution. While it may seem as though many changes are taking place in Washington, the bureaucracy is much, much too large to move very swiftly. Most districts are following the advice to stick closely with established procedures. Government operates like a pendulum. A swing too far in one direction automatically triggers a corrective opposite swing, assuring the path eventually heads more toward the middle of the road.

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[35] Pub. L. No. 96-354.
[36] Pub. L. No. 96-511.

Some people are concerned right now, however, that the Reagan administration could be endangering the long-term prospects for continued federal aid to education. By attempting to cut back the specific regulatory stipulations for federal programs and monies, the administration is trying to make these into block grant programs without the legislative authority to do so. The responsibility for implementation then goes more heavily to the state level because the federal government is taking less responsibility for managing the programs. Financial responsibility follows administrative responsibility. In the end, this could really be a way to completely turn programs over to the state, including mandates that the state finance them. This, then, becomes a prime mechanism for eliminating the federal role in education entirely. Such a decision deserves to be made in a less subtle manner.

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The Testing of Teachers: Legal Parameters and Procedures

STEPHEN B. THOMAS

Stephen B. Thomas received his Ed.D. from the University of Florida and is Professor, Division of Administrative and Instructional Leadership, St. John's University, Jamaica, New York. He is on the publication committee for the American Education Finance Association as well as being executive editor of *Journal of Education Finance*. He has spoken at a great number of education-law related programs. He has had many consulting engagements and participated in numerous statistical research projects. Dr. Thomas has an outstanding number of publications to his credit dealing with some very weighty school law problems.

Employment discrimination prior to 1964 was prohibited in part by state fair employment practices statutes, related executive orders, and the Equal Pay Act. Narrowly written laws, a dearth of relevant agency policies, poor and inconsistent administration, and limited judicial direction characterized the period. As a result, protection for victims of discrimination was limited, overt acts were common, few complaints were investigated, and mediation and court order seldom were used to provide relief.

In response to this problem, the federal legislature included Title VII in the Civil Rights Act of 1964 prohibiting discrimination because of race, color, religion, sex, or national origin, in any term, condition, or privilege of employment. The provisions of the Act have been interpreted broadly, encompassing a wide range of practices, permitting numerous forms of relief, and protecting several classes of victims. Also, the 1972 Amendments expanded the protection of the Act to state and local government employees, including public school teachers.

However, this chapter does not attempt to discuss the wide application of Title VII, but is delimited to the specific employment practice of employee testing. The purpose is to distinguish between constitutional and statutory standards for challenging discriminatory testing practices and to propose procedures that educators may follow in developing, administering, and using tests as one of several bases for making personnel decisions.

CONSTITUTIONAL AND STATUTORY STANDARDS

Where employee testing procedures are challenged in federal court, plaintiffs have based their complaints on the fourteenth or fifth amendments, or on Title VII. The fourteenth amendment prohibits states (and school districts) from denying any person the equal protection of the law or from taking life, liberty, or property without procedural due process of the law. The fifth amendment provides similar protection,[1] but has been applied by the Supreme Court to prohibit federal rather than state acts that deny due process. Nevertheless, neither of these amendments has been used often in recent years as a basis for test-related cases due to the requirement that plaintiffs must prove that the employer intended to discriminate, rather than show simply that the screening procedure adversely affected plaintiff's group. Where a discriminatory purpose is to be supported, both circumstantial and direct evidence would be examined. The historical background of the act, the sequence of events just prior to the challenged decision, departures from normal procedures, substantive departures, legislative and administrative histories, statistical evidence, and impact would be studied, where appropriate.[2]

However, the requirement that plaintiffs must prove a discriminatory intent is not limited to constitutional issues, but also applies to select Title VII cases. Claims under the Act may arise in two different ways: where facially neutral practices have *disparate impact* on a group; or where individuals receive *disparate treatment*.[3] The former requires only that adverse disproportionate impact is shown statistically; the latter, like a constitutional claim, requires the proving of a discriminatory motive.

Constitutional and statutory standards for employee testing were examined in four United States Supreme Court decisions: *Griggs v. Duke Power Co.*,[4] *Albermarle Paper Co. v. Moody*,[5] *Washington v. Davis*,[6] and *Connecticut v. Teal.*[7] Although none of these cases is education related, there is an obvious application to the current teacher-testing controversy.

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[1] Although the fifth amendment does not contain an equal protection clause, the Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), ruled that due process and equal protection are not mutually exclusive.

[2] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[3] Furnco Construction Corp. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring in part).

[4] 401 U.S. 424 (1971).

[5] 422 U.S. 405 (1975).

[6] 426 U.S. 229 (1976).

The first of these cases, *Griggs v. Duke Power Co.*, dealt with overt discrimination as well as facially neutral practices that adversely affected blacks. Prior to the effective date of Title VII (July 2, 1965), the company openly discriminated against blacks in hiring, assignment, and promotion. Beginning in 1955, a high school diploma was required for initial hiring (except for the Labor Department) and for transfer to any "inside" department. In 1965, following the effective date of Title VII, the diploma became a prerequisite for transfer from Labor to any other area (inside or outside) and all new applicants for non-Labor positions were required to register "satisfactory scores"[8] on two professionally developed aptitude tests in addition to having earned a diploma. Neither standard (diploma, test peformance) was significantly related to successful job performance and both operated to disqualify black applicants at a higher rate than white applicants.

Although the district court concluded that the company had followed a policy of overt racial discrimination prior to the Act, such conduct was found to have ceased. The court reasoned that Title VII is prospective only and that prior inequities were beyond the "reach of corrective action" of the court. The current standards and requirements of the company were found not to violate the Act.

The court of appeals agreed with the lower court that no discriminatory purpose was present in the adoption of the diploma and test requirements. The court rejected the claim that disparate impact without proof of job relatedness is sufficient to make the procedures unlawful under Title VII.

The Supreme Court, in an 8-0 decision (Justice Brennan took no part in the consideration or decision of the case) argued that Title VII was intended to achieve equality of employment opportunities and eliminate racial barriers. The Act does not command that a "person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[9] The Court went on to observe that "[w]hat is required . . . is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of [race]. . . ."[10]

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[7] 50 U.S.L.W. 4716 (U.S. June 22, 1982), *aff'd*, 645 F.2d 133 (2d Cir. 1981).

[8] Satisfactory scores approximated the national median for high school graduates. Therefore, the test standards were more stringent than the diploma requirement, because they would tend to screen out approximately half of all high school graduates. Griggs v. Duke Power Co., 401 U.S. at 328, n.3.

[9] *Id.* at 431.

Not only are overt acts of discrimination prohibited by Title VII, but also practices that are facially neutral, yet discriminatory in operation. Plaintiffs must show only that the (1) employment practice operated to disqualify proportionately more blacks than whites, and (2) the standards are not validated as being job related. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in-headwinds' for minority groups and are unrelated to measuring job capability."[11]

However, the Court did not preclude the use of testing in employment. It observed that both the legislative history of Title VII and EEOC guidelines[12] support the use of tests, assuming they "measure the person for the job and not the person in the abstract."[13]

In 1975, a second Title VII disparate impact employee testing controversy (*Albemarle Paper Co. v. Moody*) was examined by the Supreme Court. In that case, the company required applicants for skill positions to have a high school diploma and to score at or above the national norm on two examinations designed to measure nonverbal intelligence (Revised Beta Examination) and verbal facility (Wonderlic Personnel Test).

Since statistically significant correlations were computed between supervisors' ratings and three of ten job groupings for the Beta Test, seven for the Wonderlic Test, and two for both tests, the district court concluded that the tests were job related. Defendants were ruled to have "carried the burden of proof in [showing] that these tests are 'necessary for the safe and efficient operation of the business' and are, therefore, permitted by the Act."[14] However, the high school diploma requirement was not proven to improve the actual quality of the work force and was held unlawful since the tests alone were adequate to measure mental ability and reading skills.

The Fourth Circuit Court of Appeals reversed that part of the decision supporting the use of the test and noted that a proper job analysis had not been conducted and that validation did not exist for several of the job progression lines for which tests were required.

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[10] *Id.*

[11] *Id.* at 432.

[12] It was argued that although the agency guidelines were never made official, they do represent an administrative interpretation of the Act expressing the will of Congress and are entitled to great deference. *Id.* at 433-34.

[13] *Id.* at 436.

[14] Albemarle Paper Co. v. Moody, 422 U.S. at 411 *quoting* district court decision.

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The Supreme Court, in a 7-1 decision (Justice Burger dissented in part; Justice Powell took no part in the consideration or decision of the case), provided a rationale similar to that in *Griggs* by requiring that employment tests be job related where it can be shown that adverse impact exists. The Court again gave great deference to EEOC guidelines, even though they were never promulgated pursuant to formal procedures established by Congress.[15]

In reaching its conclusion, the Court was critical of the hasty validation effort made by *Albemarle*. It observed that although a test may be used as a basis for decision making for jobs other than those for which it was validated (if it is proven through job analysis that no significant differences exist between the studied and unstudied positions) no such analysis had taken place in the present case. Also, test scores were correlated with subjective supervisor rankings based on vague standards "fatally open to divergent interpretation."[16] Furthermore, only the top lines of progression were studied without consideration of the (1) normal speed of promotion, (2) efficacy of on-the-job training, and (3) alternative use of testing as a promotion rather than a hiring device. By studying the top progression lines, the validation study (based on a one-half day job analysis) examined only job experienced, white workers, while the tests were administered to younger, largely inexperienced, often nonwhite workers.

Based on the aforediscussed conclusions, the Court vacated the circuit court judgment and remanded the case to the district court to determine whether sufficient validation had taken place to merit provisional use of the test, pending new validation efforts. If provisional use were authorized, the respondents still might challenge the use of the test, even if validated, as being a pretext for discrimination in light of alternative selection procedures available to the company.[17]

As a constitutional case, the majority in *Washington v. Davis* was less concerned about the adverse impact of the challenged test than with its purpose. In that case, the distinction between the constitutional and statutory standards was clarified.

Two black police officers for the District of Columbia filed suit alleging racial discrimination in the employment practices of the police department in violation of the due process clause of the fifth amendment. Specifically, plaintiffs were concerned that Test 21 (a personnel test designed to measure verbal ability, vocabulary, reading, and comprehension) was being used as a factor in hiring and promoting even though it resulted in a disproportionately large number of blacks being disqualified and had not been validated as being job related. (The test was shown only to be helpful in selecting applicants who were more likely to succeed in the training program.)

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[15] *Id.* at 431.
[16] *Id.* at 433.
[17] *Id.* at 436.

The district court approved the use of the test as a screening device based on its relationship to training performance and the important role it played in the federal employment process. The court required neither job-related validation nor elimination of current screening procedures and concluded that "proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability. . . ."[18]

Respondents appealed the case to the District of Columbia Circuit Court of Appeals claiming that their summary judgment motion should have been granted. The motion rested on purely constitutional grounds and claimed that Test 21 invidiously discriminated against blacks, denying due process. The circuit court, guided by *Griggs*, reversed the judgment of the district court and required only that adverse impact (rather than discriminatory intent) be shown. Training-related validation, efforts at recruitment, and recent hiring ratios were less relevant to the circuit court than the fact that job-related validation was not proven.

The Supreme Court found the circuit court's application of Title VII standards to a constitutional claim to be clearly erroneous. The Court, in this 7-2 decision (Justices Brennan and Marshall dissented), observed that it would be difficult to understand how a facially neutral qualification violated any person's constitutional rights simply because a greater proportion of blacks failed the examination. The majority found it untenable that the Constitution prevents the federal government from seeking modestly to upgrade the communicative abilities of its employees rather than being satisfied with some lower level of competence, particularly where the jobs require special ability to communicate orally and in writing.

In distinguishing this case from civil-rights-related complaints, it was reasoned that the constitutional standard for adjudicating claims of racial discrimination is not identical to that applicable under Title VII. To be unconstitutional, a discriminatory purpose must be demonstrated, rather than a mere showing of disproportionate impact. Although disproportionate impact was not considered to be irrelevant, it was not the sole touchstone in a constitutional challenge. "Standing alone, it [did] not trigger the rule[19] . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[20]

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[18] Washington v. Davis, 426 U.S. at 236 *citing* 348 F. Supp. 15, 18 (D.C. 1972).

[19] McLaughlin v. Florida, 379 U.S. 184 (1964).

[20] Washington v. Davis, 426 U.S. at 242.

Although the distinction between intent and effect was clarified in *Washington* when examining constitutional versus statutory claims, the same can not be said when attempting to differentiate disparate treatment and disparate impact under Title VII, particularly since the Supreme Court rendered its 5-4 decision in *Connecticut v. Teal.*

In that case, four black provisionally appointed supervisors of the Department of Income Maintenance were denied further consideration for permanent positions because they did not register passing scores on a written examination. The test had not been validated as being job related and screened out proportionately more black than white applicants. Had plaintiffs passed the test, they would have been further evaluated (along with 246 others) for the forty-six available positions. Post-test evaluations were based on past work performance, supervisor recommendations, and seniority. (However, only the use of test results was challenged, because plaintiffs were screened out prior to the superordinate evaluations and seniority ranking.)

The defendants argued that (1) there had been no intent to discriminate, (2) the test simply was [illegible] help identify the best qualified persons, (3) every affirmative effort was made to hire qualified black supervisors, and (4) although the test screened out plaintiffs, blacks as a group actually were favored by the overall selection process. (The "bottom line" reflected a selection rate of 22.9 percent for blacks compared to 13.5 percent for whites.)

Plaintiffs argued that individuals as well as groups are protected by Title VII and that the affirmative action favoring other blacks did not justify discriminatory practices that adversely effected their opportunities for permanent positions. Disparate impact, it was argued, may be demonstrated at any stage where screening out occurs and not just at the bottom line.

The district court ruled on behalf of the state, stating that the bottom line selection percentages precluded the finding of a Title VII violation. Since the entire selection process did not result in disproportionate impact, the state was not required to validate the test.

The Second Circuit Court of Appeals reversed the district court decision and stated that pass-fail barriers must be shown to be job related where they deny employment opportunities to a disproportionately large number of blacks and prevent them from proceeding to the next step in the selection process. According to the court, disparate impact could be based totally on the results of the test, despite the fact there was no adverse impact for the protected group as a whole.

The Supreme Court affirmed the circuit court decision stating that if an employment practice operates to exclude blacks, it is prohibited unless shown to be related to job performance. The Court rejected plaintiff's bottom line defense based on EEOC guidelines 1607.4(c) which states that federal agencies will not expect a user to evaluate individual components for adverse impact unless there has been a history of discrimination or unless specific procedures were used which are viewed disfavorably by a preponderance of court decisions. According to the Court, the guidelines do not address underlying questions of law and "ignore the fact that Title VII guarantees . . . individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."[21]

The dissenting opinion observed that disparate impact does not consider whether the plaintiff as an individual has been classified in a manner impermissible under section 703(a)(2),[22] but rather considers whether facially neutral employment procedures have had an adverse impact on the group to which the individual belongs. Disparate treatment, on the other hand, is concerned with the way individuals are treated.[23]

The type of evidence required for establishing a prima facie case and for rebuttal would depend upon which of the two infractions is alleged: disparate treatment requires that the intent to discriminate be proven; disparate impact requires a showing of adverse effect. This reasoning is of particular relevance, because the intent to discriminate was not proven and disparate impact on blacks as a group did not result. Accordingly, the dissenters stated that "there can be no disparate impact unless there is disparate impact . . . . This conclusion should be as obvious as it is tautological."[24]

In addition to the four Supreme Court cases discussed above,[25] there have been several circuit[26] and district[27] court decisions specifically concerning the testing of teachers. The cases varied as to their constitutional and statutory requirements, how job-relatedness is established, and how rigid the EEOC guidelines must be applied. None of these cases, however, offers any additional insight to the solution of the testing-related controversy.

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[21] Connecticut v. Teal, 50 U.S.L.W. at 4719 (emphasis in original).

[22] Provides that it is an unlawful employment practice for an employer to "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[23] *See* Stephen B. Thomas, *The Bottom Line Theory of Defense Under Title VII: Connecticut v. Teal*, EDUCATORS AND THE LAW: CURRENT TRENDS AND ISSUES, in press.

[24] Connecticut v. Teal, 50 U.S.L.W. at 4721 *citing* EEOC v. Greyhound Lines, 635 F.2d 188, 192 (3rd Cir. 1980).

[25] *See* Stephen B. Thomas, *Affirmative Action: Equal Rights and Unequal Opportunities*, 2 no. 3 J. EDUC. EQUITY & LEADERSHIP (Spring 1982) for a related discussion.

[26] Porcelli v. Titus, 431 F.2d 1254 (3rd Cir. 1970); Carter v. School Bd., 9 FEP Cases 1146 (5th Cir. 1970); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Armstad v. Starkville Mun. Sep. School Dist., 461 F.2d 276 (5th Cir. 1972); Baker v. Columbus Mun. Sep. School Dist., 462 F.2d 1112 (5th Cir. 1972); Lee v. Macon Cty. Bd. of Educ., 463 F.2d 174 (5th Cir. 1972); United States v. Chesterfield Cty. School Dist., 6 FEP Cases 447 (4th Cir. 1973); Walston v. County School Bd. of Nansemond Cty., Va., 492 F.2d 919 (4th Cir. 1974); Pickens v. Okolona Mun. Sep. School Dist., 527 F.2d 358 (5th Cir. 1976); Moore v. Tangipahoa Parish School Bd., 594 F.2d 489 (5th Cir. 1979); Newman v. Crews, 25 FEP 1538 (4th Cir. 1981).

[27] United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S.

Summary of Case Law

Griggs gave great deference to the EEOC guidelines and established the disparate impact theory in testing-related cases. *Albemarle* appeared even more firm in commitment to the guidelines and gave plaintiffs the opportunity to demonstrate that even validated tests may be a pretext to discrimination. *Washington* was a constitutional claim and, therefore, was not bound by EEOC guidelines or a showing of disparate impact, but rather required that an intent to discriminate be shown. And, finally, *Teal* complicated the distinction between disparate treatment and disparate impact, and apparently will require employers to validate each stage of screening, even if bottom line hiring percentages do not reflect adverse racial impact.

Based on these case law precedents and related EEOC guidelines, the following procedures for validating tests to help in the selection of teachers have been developed.

VALIDATION

Identifying and selecting the best educators from the pool of applicants is not a simple task. Whether personnel decisions are either subjective or objective, unsuccessful applicants may question the appropriateness of the job criteria, the reliability and validity of the predictor (test), or the motive of the decision maker. Accordingly, there are no uncontroversial personnel decisions when some candidates are to be hired, promoted, or retained, and others are not. The procedures suggested in this section of the article will not totally solve this problem, but will (1) establish systematic and objective standards that will meet the requirements of EEOC and the federal courts, (2) help identify those teachers who possess the skill, knowledge, and ability identified as related to successful job performance, and (3) give educators a more objective basis on which to make decisions. A general discussion of reliability and validity precedes the recommended procedures. (Code numbers from EEOC guidelines are provided parenthetically where appropriate.)

1026 (1978); Georgia Ass'n of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976); James v. Board of Educ., 5 FEP Cases 79 (E.D.N.C. 1971); Teel v. Pitt Cty. Bd. of Educ., 272 F. Supp. 703 (E.D.N.C. 1967).

Reliability and Validity

. In developing a personnel test, it is particularly important that the instrument has acceptable levels of reliability and validity. Without such qualities, the test may not accurately measure the desired skills or knowledge. Resulting scores would reflect varying degrees of error in addition to any true measure of ability or aptitude.

Reliability is the accuracy or precision of the measuring instrument.[28] The less error that is in the measurement, the greater is the reliability. Without reliability, relations between variables cannot be measured accurately and, therefore, results are not dependable either as a standard for employment or as a criterion for promotion. High reliability is not a guarantee of useful test results (other factors, like validity, must be considered) but, without it, there can be no dependable results and no justifiable use of test scores. (Where tests are not reliable, improvement may result by writing questions less ambiguously, adding new questions, or revising instructions.[29])

If a test has validity, it would measure what it purports to measure. This quality is different from reliability in that it is concerned with the accomplishment of the objectives of the instrument rather than the accuracy of the measurement. Accordingly, a test may be reliable in that it provides accurate, dependable, and stable information, but may lack validity for it does not measure what it had intended to measure.

There are three types of validity that are acceptable to EEOC: criterion-related, construct, and content. Criterion-related validity also is referred to as predictive or empirical validity. It is studied by correlating test, scale, or observation scores with criteria believed to measure successful teaching performance. The problem with developing tests with criterion-related validity is the difficulty of obtaining criteria.[30] (This issue is discussed later in the article.)

Construct validity demonstrates the extent to which a test measures a trait or quality and seeks to account for variance in test performance. If this form of validity is to be shown, constructs which possibly account for test performance must be identified; hypotheses derived from the theory involving the construct must be determined; and hypotheses must be tested empirically.[31] Construct validity would be necessary where those selected for employment are required to have identifiable characteristics purported to be essential for successful teaching.

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[28] F. KERLINGER, FOUNDATIONS OF BEHAVIORAL RESEARCH 443 (2d ed. New York: Holt, Rinehart, and Winston, Inc. 1973).

[29] *Id.* at 454.

[30] *Id.* at 460.

[31] L. CRONBACK, ESSENTIALS OF PSYCHOLOGICAL TESTING 143 (3d ed. New York: Harper & Row 1970).

(However, EEOC guidelines (EEOC 1607.15(d)) have made this type of validation unlikely because criterion-related validity is required prior to the use of constructs.)

A third type of validity, content validity, requires that test items be representative of the scope and content of the study area. In employment testing, content validity would be present if the skills and knowledge being measured were representative of those performed on the job. This too is not a simple task, for it is difficult to draw random samples from a universe of content; the quality of questions and their representativeness always are in doubt. As a result, content validation consists essentially of judgment. The universe of content must be defined clearly; the judges must be furnished with specific directions for making judgments and specifications of what they are judging; and procedures for synthesizing independent judgments must be employed.[32]

Although EEOC will accept any of the above types of validity, it prefers criterion-related validity where possible. The remaining portion of this article will suggest procedures that will culminate in the development of a test with criterion-related validity.

Procedures

The first step in developing job-related tests is to conduct a thorough job analysis to determine measures of work behavior or performance that are necessary for good teaching (EEOC 1607.14(B)(2)). This process may require extensive meetings, hearings, and debates. It will be discovered that the only position that educators will initially agree upon in attempting to identify the qualities of a "good" teacher is that no measure, when examined independently, provides an accurate indicator. In fact, most educators may not be able to "define good teaching, but will know it when they see it." Nevertheless, in spite of this lack of unanimity, it is required that consensus be reached among the professional educators in identifying desireable teacher qualities and in assigning weights to the invididual measures, if necessary. It is not required that every aspect of the job be reflected in the criteria; but those that are selected should be of major importance as indicated in the job analysis. Federal courts and EEOC will be more concerned with the care taken in developing procedures and deriving criteria than with the nature of the criteria selected. They give great deference to the expertise of educators and are unlikely to challenge professional judgments regarding criteria or weights, unless arbitrary or overtly discriminatory.

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[32] F. KERLINGER, *supra* note 28 at 459.

Following the identification of criteria and the assignment of weights, it is necessary to develop a test that is designed to measure the degree to which the test taker possesses the qualities identified in the job analysis (step 2). It is recommended that professional test developers be assigned this responsibility rather than relying on local, well-intended talent. The reputation of the test developer will not give validity to the test (EEOC 1607.9(a)); however, professional test developers are more likely to have the expertise and experience necessary to construct such sophisticated instruments and to understand methodological or design requirements.

Following the development of the test, it should be administered to *all* otherwise qualified applicants to be hired for the Fall of 1983 (step 3). However, since the test has not been validated, and there is not sufficient proof to support a conclusion that it will be, the results are to be used only in the validiation exercise and are not yet to be used as a factor in the selection of teachers or to be a measure of teacher adequacy (EEOC 1607.14(B)(3)). The school districts participating in the validation must hire only those teachers who otherwise would have been selected without the use or knowedge of the test results. (In fact, to avoid any unintended bias, test results should not be available to the person(s) responsible for screening [33])

Requiring districts to select teachers on standards other than test results accomplishes two objectives: first, it avoids the filing of an EEOC complaint challenging the use of nonvalidated tests; second, it likely will result in a mix of teachers whose test scores will represent a greater range than would have otherwise resulted if the test had been used as a basis for selection and only the top-scoring 25 percent were offered teaching positions. If the scores of those hired are at the top of the distribution, it is difficult to demonstrate validity, even if it is present, because evidence of validity is largely dependent on the amount of variation in the predictor scores of those hired.

It also should be noted that EEOC requires (EEOC 1607.4(B)) that separate data be gathered by sex, race, and ethnic group (whites, blacks, American Indians, Asians, and Hispanics) when validating a study, but does not require that minority persons be hired simply to generate a sufficient data base for comparison purposes (EEOC 1607.14(B)). For discussion purposes, however, assume that the mix of teachers selected in this study approximates that of the available labor pool and that the teachers received a wide range of high and low scores. The next two steps (4 & 5) are similar in that otherwise qualified applicants are tested for 1984-85 and 1985-86 positions, and the scores are neither known nor used by the persons responsible for selection.

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[33] M. MINER & J. MINER, EMPLOYEE SELECTION WITHIN THE LAW, 101 (Washington D.C.: The Bureau of National Affairs, Inc. 1978).

Three years of predictor (test) scores now are available to the validators, but no comparable criterion measures have been generated. To accomplish this task, data must be gathered for the teachers hired in 1983-84 for each of the criteria identified through the job analysis (step 6). This routinely may be accomplished during the third year of employment because extensive evaluations are required in most states before a teacher is to be given a tenure or continuing contract for the fourth year. By basing tenure evaluations on the job analysis criteria, two separate but important objectives are met: first, criterion measures will be generated to help in the validation exercise; second, tenure decisions will be based on more objective and varied standards than likely would be provided otherwise. Also, by overlapping tenure evaluation and criterion data gathering, the cost of validation is reduced substantially.

Now that the criterion measures have been generated for the 1983-84 teacher class, comparisons and correlations are possible (step 7). Generally, a correlation coefficient is computed to characterize the relationship between the predictor and criterion data. This validity coefficient may be computed in several ways,[34] and yields values between -1.0 and $+1.0$. The more extreme the value (positive or negative), the greater the predictive validity. (Where multiple predictors are used, it may be necessary to cross validate or combine predictors.) If, in the final analysis, the correlation coefficient for the predictor and criterion is significant at the .05 level (probability of no more than 1 in 20 to have occurred by chance) the test may be used as a factor in employment decisions beginning in 1986-87, even though the validation study is not complete. (However, persons who did not receive a passing score should be allowed to retake the test periodically (EEOC 1607.12)). The EEOC requires only that the study be in progress and that there is reason to believe that the test eventually will be validated. Based on the statistically significant results of the 1983-84 class, support for the temporary use of the test is provided.

In 1986-87 and 1987-88, criterion measures will be available through tenure evaluations for the teacher classes of 1984-85 and 1985-86, respectively (steps 8 & 10). Identical statistical applications should be made for these data (steps 9 & 11), with each year's predictor and criterion measures being combined with the previous year(s) in order to enlarge the sample size. As long as the results remain significant (.05 level), continued use as a basis for screening is permitted.

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[34] *Id.* at 107-124.

However, if the correlation is not significant, test revision is required (step 12), and scores should be used only for validation purposes until statistically significant results once again are obtained.[35]

At the end of this six-year period, a sufficient sample size will have been generated; the various racial, religious, and sex groups will have been represented; a longitudinal study will have been conducted; and systematic procedures will have been initiated for the test to be continuously evaluated and revised.

CONCLUSION

The above procedures have been simplified for the purpose of inclusion in this publication. There are a number of issues related to job analysis; test development; sample selection; test administration; criterion selection; weighting, aggregating; use of statistics; significance levels; interpretation of data; and development of revised forms that merit additional discussion. Nevertheless, federal courts and EEOC should be satisfied with these guidelines, while educators should be within the letter, and the intent, of the law. Ideally, the best qualified teachers will be identified and hired, and the quality of education will be improved.

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[35] However, if the test, in this hypothetical example, is proven job related, test developers/validators need not consider any drastic revision of the instrument, but would conduct an item analysis to glean those questions not distinguishing between high and low achievers and replace such items with alternatives meeting the same initial testing objective. Therefore, beginning in 1986-87, the test may be a revised version of the one administered the previous three years. If the item analysis and revision were successful, the significance level may be reduced when criterion measures are gathered for the teacher class of 1986-87, the first group to be administered the revised form.

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The New Member on the Court: Potential Effect on School Law Decisions

CHARLES F. FABER*

Charles F. Faber is presently Professor and Chairman of the Department of Administration and Supervision, College of Education, University of Kentucky. He received his Ph.D. in educational administration from the University of Chicago. He is well qualified in the field of publications, having written textbooks, articles, book chapters and monographs as well as editing experience. He has served many educational agencies as a speaker, chairman, moderator, administrator, and many other services associated with school law.

INTRODUCTION

The purpose of the following article is to analyze the voting record of Justice Sandra Day O'Connor on cases related to education and to assess the impact of those votes. In order to provide such an analysis the decisions of the Supreme Court during the 1981-82 term were classified under one of seven different headings: religion and the schools; freedom of expression; due process of law; racial segregation; racial discrimination; sexual discrimination; and other equal opportunity and civil rights cases.

RELIGION AND SCHOOLS

During the term beginning in October, 1981 and ending in July, 1982 the Supreme Court decided only three cases directly related to education and religion. Of these three, two were concerned with college related affairs, and one dealt with private religious schools on the primary and secondary level. There were none related to religious practices in the public schools.

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* Assisted by Franklin L. Foster, Social Studies Teacher, Allen County Public Schools, Scottsville, Kentucky.

Of the three cases decided, the first spoke to "the question of whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion."[1] In an 8-1 opinion written by Justice Powell, and dissented to only by Justice White, the Court held that a University of Missouri at Kansas City (UMKC) regulation that prohibited the use of university facilities "for the purpose of religious worship or religious teaching" violated the fundamental principle that a state regulation of speech should be content neutral.

In this instance the Court ruled that any university regulation that sought to exclude any group from a historically open forum must "satisfy the standard of review appropriate to content-based exclusions; *i.e.*, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." It was the opinion of the Court that the UMKC regulation in question failed to pass that test. The Court in overturning the exclusionary rule explained that an "equal access" policy need only pass a three-pronged test in order not to offend the establishment clause of the constitution. This test required only that the policy (1) have a secular legislative purpose; (2) that its principal effect would be neither the advancement nor inhibition of religion; and (3) that it not foster "an excessive government entanglement with religion." In this case the university's pre-exclusionary policy of open access to university facilities was seen as passing this test. Thus the Court, in nullifying UMKC's exclusionary rule, gave its approval to the policy that it had replaced.

The second case to reach the Supreme Court dealing with the establishment of religion revolved around the right of the federal government to give surplus property to a sectarian college.[2] In this instance, the Secretary of Education, under power given him by the Federal Property and Administrative Services Act of 1949, transferred a 77-acre tract of land valued at $577,500 to the Valley Forge Christian College. Under the terms of the Act in question the value of any surplus property could be discounted by the secretary by taking "into account any benefit which has accrued or may accrue to the United States from the transferee's use of the property." In this case the college in question was allowed a 100 percent public benefit allowance, thus allowing its acquisition of the property fee free.

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[1] Widmar v. Vincent, 102 S. Ct. 269 (1981).

[2] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 50 U.S.L.W. 4103 (U.S. 1982).

The respondents in this case challenged the transfer of this property on the grounds that it "violated the establishment clause of the first amendment, and alleging that each member of the respondent organization 'would be deprived of the fair and constitutional use of his (her) tax dollars.'"

In a 5-4 split decision, in which Justice O'Connor voted with the majority, the Court ruled that the respondents had no standing, as taxpayers or citizens, to challenge the transfer in question. The Court in this case ruled that "The exercise of judicial power under article III is restricted to litigants who can show 'injury in fact' resulting from the action that they seek to have the court adjudicate" and that the respondents could in fact show no such injury.

The decision in this case was delivered by Justice Powell with the vote splitting along ideological lines. By carrying two "swing votes" (Powell and White) the conservative bloc (Rehnquist, Burger, and O'Connor) was able to establish the decision and loosen any tight separation of church and state in this area.

In the final case concerning religion and the schools, the Court was asked to rule on the constitutionality of a California law that required religious schools unaffiliated with any church to pay unemployment insurance taxes.[3] The religious schools in this instance argued that they were exempt from the state unemployment taxes in question because of their protection under the establishment and free exercise clauses of the first amendment.

In an opinion delivered by Justice O'Connor, the Court in a 7-2 decision, declined to rule on the constitutionality of California's right to collect the unemployment taxes. The Court ruled instead that the Tax Injunction Act prohibits federal courts from enjoining, suspending, or restraining the assessment or collection of any state tax where "a plain, speedy and efficient remedy" can be reached in state courts and that such a condition existed in this instance. In O'Connor's opinion,

> [i]f this court were . . . to reach the First Amendment issues presented in this appeal, the litigants would have sidestepped neatly Congress' intent and our long-standing policy "to limit drastically" federal interference in the administration of state taxes when a "plain, speedy and efficient" state remedy is available.

Justice O'Connor has served as an assistant state attorney general, as a legislator, and as a state judge. Coming from this background she has been in position to view federal encroachment on states' rights.

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[3] California v. Grace Brethren Church, 50 U.S.L.W. 4703 (U.S. 1982).

Through decisions such as the one above, it can readily be seen that she will not be a justice prone to abuse federal power at the expense of states' rights.

FREEDOM OF EXPRESSION

During the 1981-1982 Court term the most widely publicized case dealing with first amendment rights arose over the issue of book censorship.[4] In essence, the questions presented by this case revolved around whether the "First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries."

In its 5 to 4 decision, which did not produce a majority opinion, the Court remanded the case back to the district court for trial. The lack of a majority opinion means that the Court provided no constitutional standard or guidelines to govern future action on the issue. Yet civil rights advocates generally regard the ruling as a significant victory because it establishes that book censorship in public schools may be subject to court review.

The 5-4 decision in this case again broke sharply along ideological lines with the "swing votes" on this occasion allowing a liberal decision. In penning a dissent to this decision Justice O'Connor argued that

> If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it.

In this case Justice O'Connor again speaks from a conservative standpoint and defends the exercise of local power.

DUE PROCESS

In a 5-4 decision, in which Justice O'Connor voted with the minority, the Court held that the "fair preponderance of the evidence" standard prescribed by the New York Family Court Act violates the due process clause of the fouteenth amendment.[5]

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4. Board of Educ., Island Trees Union Free School Dist. v. Pico, 50 U.S.L.W. 4831 (U.S. June 25, 1982).

5. Santosky v. Kramer, 50 U.S.L.W. 4333 (U.S. 1982).

The Court in this case argued that

> The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

In speaking to these standards, Justice Blackmun wrote in the majority opinion that

> In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three Eldridge factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

O'Connor joined in Rehnquist's dissenting opinion in this case. This dissent accused the Court's majority of utilizing a "tunnel-vision application of due process principles" that ignored the "fairness of the New York procedure." The dissent continues by following a conservative states' rights line and concludes by saying that

> today's decision cavalierly rejects the considered judgment of the New York legislature in an area traditionally entrusted to state care. The court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems.

Considering O'Connor's background and votes so far covered, it seems reasonable to believe that she would dissent in a case whose majority opinion could be considered an infringement by the federal government on traditional state power.

Youngberg v. Romeo[6] presented the question of whether an individual

> involuntarily committed to a state institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation" (i.e. training and development of needed skills).

In this instance the case was filed by Paula Romeo on behalf of her son, Romeo. Romeo, who is profoundly mentally retarded, was involuntarily committed to a Pennsylvania state institution. After observing injuries suffered by her son while incarcerated in the institution, Ms. Romeo filed for damages against petitioner institution officials claiming protection under the eighth and fourteenth amendments.

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[6] Youngberg v. Romeo, 50 U.S.L.W. 4681 (U.S. 1982).

In a unanimous decision the Court held that the respondent did have constitutionally protected liberty interests under the fourteenth amendment. That these interests included the right to "safe conditions of confinement," to "freedom from unreasonable bodily restraints," and to "such minimally adequate training as reasonably may be required by these interests." In ascertaining whether these rights have been violated, the Court ruled that "these liberty interests [must be balanced] against the relevant state interests." The proper standing in the balancing of these interests could, according to the Court, be best realized by "show(ing) deference to the judgment exercised by a qualified professional, whose decision is presumptively valid."

RACIAL SEGREGATION

Two cases dealing with school desegregation came before the Supreme Court during Justice O'Connor's first term. Both of these cases dealt with voter-approval anti-busing laws, both were argued on March 22, 1982, and both were decided on June 30, 1982. While the timing and content of these cases were in someways similar, the findings were very different.

The case from California[7] concerned an amendment to the due process and equal protction clauses of the state constitution—clauses that had, prior to Proposition I, prohibited de facto as well as de jure segregation. This amendment (Proposition I) was ratified by the voters of California in 1979 and provided that,

> no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transporation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause.

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[7] Crawford v. Los Angeles Bd. of Educ., 50 U.S.L.W. 5016 (U.S. 1982).

In this instance the question before the Court was whether Proposition I was in violation of the fourteenth amendment. The decision of the Court, written by Justice Powell and dissented to only by Justice Marshall, was that this law did not violate the fourteenth amendment. Speaking for the majority, Powell wrote,

> We agree with the California Court of Appeal in rejecting the contention that once a state chooses to do "more" than the Fourteenth Amendment requires, it may never recede. . . .
>
> In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.

The second school desegregation case came from Washington.[8] In this case the Seattle School District No. 1 enacted a plan for the desegregation of its schools that made extensive use of mandatory busing. Later that same year (1978) the voters of Washington passed a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration in the public schools of the state. This initiative (Initiative 350) provided that:

> [N]o school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next to nearest the student's place of residence . . . and which offers the course of study pursued by such student.

After the passage of Initiative 350 the Seattle, Tacoma, and Pasco school districts brought suit against Washington, challenging the constitutionality of Initiative 350 under the equal protection clause of the fourteenth amendment. Accordingly, the question before the Court was "whether an elected local school board may use the fourteenth amendment to defend its program of busing for integration from attack by the State."

In this case the Supreme Court, in a 5-4 decision, upheld the decision of the federal district court that Initiative 350 did indeed violate the equal protection clause of the fourteenth amendment. In defending its decision the Court said that:

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[8] Washington v. Seattle School Dist. No. 1, 50 U.S.L.W. 4998 (U.S. 1982).

> Initiative 350 must fall because it does "not attemp(t) to allocate governmental power on the basis of any general principle," Hunter v. Erickson, 393 U.S., at 395, but instead uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities.

With this decision the power of school boards to use the fourteenth amendment to defend busing programs from state attack was established.

While voting with the majority in the *Crawford* case, Justice O'Connor "lost her vote" in the case from Washington. In this latter case O'Connor joined, along with Burger and Rehnquist, in a dissenting opinion written by Powell, which states:

> We are not asked to decide the wisdom of a State policy that limits the ability of local school districts to adopt—on their own volition—mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State—exercising its sovereign authority over all subordinate agencies—should be free to reject this debatable restriction on liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the unresolved questions resulting from extensive mandatory busing. The Constitution does not dictate to the States at what level of government decisions affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.

This statement, endorsed by Justice O'Connor, is a firm expression of a strong belief in states' rights. Thus from her votes and the opinions that she has supported O'Connor continues to show great support for states' rights, not only from federal intrusion but also from a usurpation of power from below.

RACIAL DISCRIMINATION

Several racial discrimination/affirmative action cases came before the Supreme Court in the term ending in July, 1982. Of these cases, none were directly applied to education. Others that originated outside that field could, however, given the appropriate circumstances, be related to it.

Of those cases arising outside the field of education, the first to be considered and decided arose in Virginia. This case[9] was initiated by a number of black employees of the American Tobacco Company and charged that "certain lines of progression for job advancement established by the employer in agreement with petitioners labor unions after the effective date of the Act constituted a racially discriminatory seniority system in violation of Title VII of the Act."

In this instance the employees sought protection through section 703(h) of the Civil Rights Act of 1964. This section provides in part that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bonafide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professional developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because race, color, religion, sex, or national origin.

Justice O'Connor voted in this instance with the conservative majority in a 5-4 decision that split along ideological lines. In this case the Court held that section 703(h) permits employment discrimination when that discrimination results from the operation of a bona fide seniority system as long as that system was not adopted with intent to discriminate. In addition, the Court held that the section 703(h) defense is not merely a grandfather provision for pre-Act seniority systems but that it also shelters seniority systems adopted after the effective date of the act.

In a case[10] closely related to *American Tobacco Company v. Patterson* the Court was asked to rule on

> whether a Court of Appeals is bound by the "clearly erroneous" rule of Fed. Rules Civ. Proc. 52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the bona fides of the seniority system.

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[9] American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364 (U.S. 1982).

[10] Pullman-Standard v. Swint, 50 U.S.L.W. 4425 (U.S. 1982).

Here the Court was not asked to review whether or not the seniority system at Pullman-Standard was in compliance with section 703(h) of the Civil Rights Act of 1964. The question here was rather whether the court of appeals had violated Federal Rule of Civil Procedure 52(a) that "requires that a District Court's findings of fact not be set aside unless clearly erroneous." The court of appeals in this case had concluded,

> that a finding of discrimination or nondiscrimination under 703(h) was a finding of "ultimate fact" that the court would review by making "an independent determination" of (the) allegations of discrimination, though bound by findings of subsidiary fact which were themselves not clearly erroneous.

Justice O'Connor again voted with the majority in a case decided by a 7-2 vote. Overriding the court of appeals, the Supreme Court declared that,

> When the Court of Appeals concluded that the District Court had erred in failing to consider certain relevant evidence, it improperly made its own determination based on such evidence. When a district court's findings as to discriminatory intent under (Section) 703(h) is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

The decision in this case thus helps define the roles of the inferior courts and limits the power of the court of appeals to set aside "findings of fact" coming from the district level.

In yet another case[11] involving section 703(a) of the Civil Rights Act of 1964, black employees of a Connecticut state agency argued that regardless of the percentage of back candidates actually promoted (as compared to white candidates) to upper level jobs, it was nevertheless a violation of Title VII for the state to require "as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related."

The state argued in its behalf that even though the passing rate for blacks for the test in question was only 68 precent of that for whites, that the "bottom line" was that after promotions were made from the eligibility list, 22.9 percent of the blacks were promoted and only 13.5 percent of the whites were.

Declaring that "The principal focus of (section) 703(a)(2) is the protection of the individual employee, rather than the protection of the minority group as a whole" the Court upheld the employees' claim. In this vein, Brennan, in delivering the majority opinion said that,

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[11] Connecticut v. Teal, 50 U.S.L.W. 4716 (U.S. 1982).

> Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory.

The 5-4 decision in this case was carried by the five members most traditionally liberal. A pragmatic dissent was filed by Powell and it was joined by Burger, Rehnquist, and O'Connor. This dissent held that:

> Today's decision takes a long and unhappy step in the direction of confusion. By its holding today the Court may force employers either to eliminate tests or rely on expensive, job-related, testing procedures, the validity of which may or may not be sustained if challenged. For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simply quota hiring.

In an employment discrimination case from Pennsylvania[12] the Court was asked to decide whether

> liability under 42 U.S.C. (section 1981) requires proof of discriminatory intent and whether, absent such proof, liability can nevertheless be imposed vicariously on the employers and trade associations for the discriminatory conduct of the union.

The situation here was one in which contractors hired individuals through an "exclusive hiring hall established in collective-bargaining contracts between the local union representing operating engineers and petitioners trade associations and construction industry employers." In this case the union was operating a discriminatory operation from which the contractors hired employees. The question thus arising was whether these employers could be held responsible for discriminatory practices themselves under the Civil Rights Act of 1866 (section 1981) and the Enforcement Act of 1870.

It was the opinion of the Court that liability could not be imposed on the contractors without proof of intentional discrimination. In a 7-2 decision, delivered by Justice Rehnquist and dissented to only by Justices Brennan and Marshall, the Court held that section 1981 is violated only when employers intentionally discriminate and that the intentionality itself must be proved, not simply that a group has been adversely affected.

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[12] General Bldg. Contractors Ass'n v. Pennsylvania, 50 U.S.L.W. 4975 (U.S. 1982).

Concurring in this judgment, Justice O'Connor nonetheless suggested that once the unions were put into compliance, that groups such as the contractors could be asked to file

> quarterly reports providing employment statistics necessary for the court to ascertain whether its injunctive decree is being properly implemented . . . (these reports being) . . . ordered under the courts equitable powers to effectuate its decree.

The final racial discrimination case to be decided by the Court during the 1981-82 term came from Georgia.[13] The issue in this case was "whether the at-large system of elections in Burke County, Georgia, violates the Fourteenth Amendment rights of Burke County's black citizens."

According to the 1980 census Burke County had a total population of 19,349 of whom 10,385 or 53.6 percent were black. Even though the majority of the population was black, only 38 percent of the 6, 373 persons registered to vote in the county were of that race. The low percentage of black registered voters, the fact that the county was characterized by bloc voting along racial lines, and the fact that the county utilized an at-large system for electing members of its governing Board of Commissioners combined to produce a condition wherein no black had ever been elected to the county's governing body. Blacks from the county saw the at-large electoral system as a violation of their rights under the fourteenth and fifteenth amendments and so brought suit to have the condition rectified.

In a 6-3 decision, with O'Connor voting with the majority, the Court upheld the decision of the district court, declared for the appellees, and ordered the adoption of single-member districts. In this decision the Court:

> decline(d) to overturn the essential findings of the District Court, agreed to by the Court of Appeals, that the at-large system in Burke County has been maintained for the purpose of denying blacks equal access to the political processes in the county.

SEXUAL DISCRIMINATION

In 1970 a federal court class-action suit was brought against Trans World Airlines. This suit alleged

> that TWA practiced unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 by its policy of grounding all female flight attendants who became mothers

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[13] Rogers v. Lodge, 50 U.S.L.W. 5041 (U.S. 1982).

> while their male counterparts who became fathers were permitted to continue flying.

Later TWA filed a motion to exclude those class members who had not filed charges with the EEOC within the time limit (90 days) specified by Title VII.

In the case reaching the Supreme Court[14] the question was

> whether the statutory time limit for filing charges under Title VII . . . is a jurisdictional prerequisite to a suit in district court. Secondarily, (the Court was to) resolve a dispute as to whether retroactive seniority was a proper remedy in this Title VII case.
>
> The 8-0 decision in this case (Justice Stevens took no part) ruled that

> filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.

Secondarily, the Court held that retroactive seniority was a proper remedy.

This case then removes the 90 day "period of limitations" as a defense against and protection from federal sex discrimination cases under Title VII.

In the most widely publicized Title IX case of the term[15] the Court was asked to rule on

> the validity of regulations promulgated by the Department of Education pursuant to Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373, 20 U.S.C. (Section) 1681 et seq. These regulations prohibit federally funded education programs from discriminating on the basis of gender with respect to employment.

According to section 901(a) of Title IX of the Education Amendments of 1972:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to any discrimination under any education program or activity receiving Federal financial assistance.

The penalty for continued noncompliance with this directive was to be termination of federal funds or denial of future grants.

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[14] Zipes v. Trans World Airlines, 50 U.S.L.W. 4238 (U.S. 1982).

[15] North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (U.S. 1982).

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The question in this case was whether "person," as interpreted by HEW to include employees as well as students, was in agreement with Title IX. In this instance the Court ruled 6-3 that employment discrimination did indeed come within Title IX's prohibition. According to the majority opinion of Justice Blackmun, since the statute in question:

> neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary. After all, Congress easily could have substituted "student" or "beneficiary" for the word "person" if it had wished to restrict the scope.

Justice O'Connor joined the majority in this decision—a decision that has to be considered a victory for women's rights organizations and civil rights groups since it allows the threat of federal termination of funds to protect against sexual discrimination in employment.

In a sex discrimination case originating with employees of the Ford Motor Company[16] the Court was presented with the question of

> whether an employer charged with discrimination in hiring can toll the continuing accural of backpay liability under (Section) 706(g) of Title VI, 42 U.S.C. (Section) 2000e-5(g), simply by unconditionally offering the claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination.

In a 6-3 decision dominated by its most conservative members, the Court held that an employer charged with discrimination in hiring under Title VII could end the continuing accural of backpay liability "by unconditionally offering the claimant the job previously denied, and is not required to offer seniority retroactive to the date of the alleged discrimination."

Thus, according to the majority opinion filed by Justice O'Connor,

> when a claimant rejects the offer of the job he originally sought, as supplemented by a right to full court-ordered compensation, his choice can be taken as establishing that he considers the ongoing injury he has suffered at the hands of the defendant to have been ended by the availability of better opportunities elsewhere. For this reason, we find that, absent special circumstances, the simple rule that the ongoing accural of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII's policy of making discrimination victims whole.

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[16] Ford Motor Co. v. EEOC, 50 U.S.L.W. 4501 (U.S. 1982).

This decision gives an employer a strong incentive to hire the claimant to a job. It does this while failing to disrupt any established seniority hierarchy that would threaten the rights of innocent incumbent employees.

Justice O'Connor delivered the opinion of the Court in the final sex discrimination case of the 1981-82 term.[17] This case, according to O'Connor "present(ed) the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the equal protection clause of the fourteenth amendment."

This case originated when the Mississippi University for Women (MUW) refused Joe Hogan the right to enroll for credit in its School of Nursing. The school in this instance defended its single-sex admissions policy by claiming "that it compensates for discrimination against women and, therefore, constitutes educational affirmative action." In addition to this supposedly rational defense of single-sex admission, the school also claimed protection for this policy through subsection 5, of section 901(a) of Title IX of the Education Amendments of 1972. This subsection

> exempts from (Section) 901(a)'s general prohibition of gender discrimination in federal funded education programs the admissions policies of public institutions of undergraduate higher education "that traditionally and continually from (their) establishment (have) had a policy of admitting only students of one sex."

In a 5-4 decision the Court held that in the first instance,

> [r]ather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the school of nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.

and secondly that,

> [a]lthough we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.

Therefore the ruling held for respondent Hogan and declared MUW's single sex admissions policy to be in violation of the fourteenth amendment.

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[17] Mississippi Univ. for Women v. Hogan, 50 U.S.L.W. 5068 (U.S. 1982).

OTHER EQUAL OPPORTUNITY AND CIVIL RIGHTS CASES

In an extremely well-publicized case from the southwest area, the Supreme Court was asked to decide whether Texas could deny free public education to school-age children that could not prove that they had been legally admitted to the United States.[18] The plaintiffs in this case challenged a Texas statute that mandated the withholding of state funds to local school districts for any children who were not legally admitted into the United States. This statute was challenged under the equal protection clause, which states in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

In a 5-4 decision the Court held for the plaintiffs in this case. Stating that the Texas statute violated the equal protection clause of the fourteenth amendment, Brennan's opinion declared:

> If the state is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.

Continuing, Justice Brennan stated the belief that the Texas statute helped neither the child nor the state. That,

> [t]he stigma of illiteracy will mark them (those affected by the statute) for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our nation.

O'Connor, again following her states' rights convictions, joined in Burger's dissenting opinion. Arguing that "the Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulations of 'remedies' for the failures—or simply the laggard pace—of the political processes of our system of government" the dissenters quarrled not with the morality of the majority decision, but rather with its legal correctness under the fourteenth amendment.

During Justice O'Connor's first term, Florida provided the Court an employment discrimination case that helped define procedure. This case, *Patsy v. Florida Board of Regents*,[19] presented the question of whether "exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. 1983."

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[18] Plyer v. Doe, 50 U.S.L.W. 4650 (U.S. 1982).

[19] Patsy v. Florida Bd. of Regents, 50 U.S.L.W. 4731 (U.S. 1982).

Georgia Patsy had filed an action in federal district court seeking relief or damages from Florida International University. This university, she claimed, had denied her employment opportunities solely on the basis of her race and sex. Respondent university moved to dismiss the case because petitioner Patsy "had not exhausted available state administrative remedies." The district court granted the university's motion and the court of appeals agreed.

The Supreme Court however did not agree with the decision of the lower courts and ruled instead, 7-2, that exhaustion of state administrative remedies was not a prerequisite to an action under section 1983. By this ruling the Supreme Court nullified an opportunity to reduce the federal caseload by forcing claims into state channels. Seizing the opportunity, Justice O'Connor, in a concurring opinion, used the outcome of this case to make a legislative suggestion:

> [For although] . . . in the absence of additional congressional legislation, exhaustion of administrative remedies is not required in (Section) 1983 actions. Perhaps Congress' enactment of the Civil Rights of Institutional Persons Act, 42 U.S.C. (Section) 1997 et. seq., which creates a limited exhaustion requirement for prisoners bringing (Section) 1983 suits, will prompt it to reconsider the possibility of requiring exhaustion in the remainder of (Section) 1983 cases.

In *Rendell-Baker v. Kohn*[20] the Court was faced with another employment dispute. In this case the Justices "granted certiorari to decide whether a private school whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees."

In this case the petitioners, a former vocational counselor and five teachers, claimed that they had been discharged by the New Perspectives School in Brookline, Massachusetts, in violation of their first, fifth, and fourteenth amendment rights. They held that although the school was ostensively private, it depended heavily (90+ percent) upon public funds for its operating expenses and it was regulated by state laws—thus making its actions "under color of state law" and subject to liability under section 1983.

The Supreme Court, in a 7-2 decision, held in this case for the school and declared that it "did not act under color of state law when it discharged petitioner employees, and hence petitioner employees have not stated a claim for relief under (Section) 1983." In defending this decision the Court said that:

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[20] Rendell-Baker v. Kohn, 50 U.S.L.W. 4825 (U.S. 1982).

> The school's receipt of public funds does not make the discharge decisions acts of the State. . . . The school is not fundamentally different from many private corporations whose business depends primarily on contracts with the government, and whose acts do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Justice O'Connor joined in Chief Justice Burger's majority opinion, which freed private schools from the constraints of section 1983 independent of any public funding.

A case of special interest to administrators of state-operated colleges and universities came before the Court in March, 1982.[21] In this case the University of Maryland granted preferential treatment, in terms of tuition and fees, to students with "in-state" status. To gain in-state status, citizens and immigrant aliens had only to show domicile within the state. Nonimmigrant aliens, however, even if domiciled, were ineligible for in-state status. The question presented the Court was "whether the University's in-state policy is invalid under the Supremacy Clause of the Constitution, insofar as the policy categorically denies in-state status to domiciled nonimmigrant aliens who hold G-4 visas."

The Court in this case held for the respondent nonimmigrant students. In a 7-2 decision the Court declared that:

> [T]he Federal Government has not merely admitted G-4 aliens into the country; it has also permitted them to establish domicile and afforded significant tax exemptions on organizational salaries. In such circumstances, we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification.

Therefore the university policy that denied domiciled G-4 aliens and their dependents the ability to acquire in-state status was in violation of the supremacy clause.

In this case Justice O'Connor voted with the majority but filed a separate opinion concurring in part with, and dissenting in part from, the Court's judgment. She agreed that G-4 aliens who had been exempted from state taxes were exempt also from any additional tuition charges resulting from a failure to qualify for "in-state" status. She, however, reminded the Court that there were different classifications of G-4 aliens and that not all had been exempted by Congress from having to pay state taxes. In this vein she "concluded that the

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[21] Toll v. Moreno, 50 U.S.L.W. 4825 (U.S. 1982).

Supremacy Clause does not prohibit the University from charging out-of-state tuition to those G-4 aliens who are exempted by federal law from federal taxes only." This statement thus continues O'Connor's reasoning on behalf of state's rights.

During the latter months of the 1981-82 term the Supreme Court reached its first decision regarding the Education for All Handicapped Children Act (P.L. 94-142). The Court was asked in this case to interpret the Act's requirement of a "free appropriate education" as it applied to Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York.[22]

Arguments for Rowley held that she was entitled to an interpreter for the deaf under P.L. -142's requirement for a "free, appropriate education." The board on the other hand held that such was not the case; that the law merely required that each child be provided an education tailored to the unique needs of the individual handicapped child and that this did not mean that all possible provisions (in this case an interpreter) had to be met.

In holding for the board in this case the Supreme Court reversed the judgment reached by the district court and the court of appeals. According to the 6-3 majority opinion written by Justice Rehnquist, the intent of the 1975 law was "more to open the door of public education to handicapped children than to guarantee any particular level of education once inside." Writing that the law "generates no additional requirement that the services provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Rehnquist thus required the state to do little more than show that an individualized education program (IEP) had been developed for each child and that it was "reasonably calculated to enable the child to receive educational benefits."

The vote in this case found Justice O'Connor again in the majority. Given her prior voting record, it should have come as no surprise that she again championed the cause of state's rights—in this case voting with local school boards and against national advocates for the handicapped and the National Education Association.

The final education-related case to be decided by the Supreme Court during Justice O'Connor's first term addressed the question of whether,

> federal law pre-empts a state tax imposed on the gross receipts that a non-Indian construction company receives from a tribal school board for the construction of a school for Indian children on the reservation.

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[22] Hendrick Hudson Cent. School Dist. Bd. of Educ. v. Rowley, 50 U.S.L.W 4925 (U.S. 1982).

In this case the state of New Mexico collected gross receipt taxes totaling $232,264.38 from the Lembke Construction Company for construction done by that company for the Ramah Navajo Chapter of the Navajo Indian Tribe.[23] Since Lembke had included the state gross receipts tax as a cost of construction in its bid for the construction, the tax money in question was actually coming to the state from the Ramah Navajo School Board.

Lembke and the Ramah Navajo School Board filed suit against the New Mexico Bureau of Revenue claiming that under federal law (Indian Commerce Clause, art. I, sec. 8, cl. 3) the state had no right to tax an Indian tribe without Congressional approval. This argument was upheld in a 6-3 decision of the Supreme Court in which Justice O'Connor voted with the majority. In the majority opinion written by Justice Marshall, the Court declared that "the comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax in this case."

Voicing the opinion that this principle has been firmly established by precedent, the Court admonished the lower courts:

> Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

SUMMARY

Although a single Court term is too narrow a time on which to establish an accurate, thorough assessment of Justice O'Connor, it is not too short a time on which to base an analysis of her ideological beliefs concerning the law.

Speaking to these beliefs, it can readily be seen that President Reagan "got what he bargained for" in his appointment of O'Connor—a female Justice firmly out of a conservative mold and a staunch believer in states' rights. Considering all cases on which full opinions were written this term (143), one finds that O'Connor voted with Rehnquist in 123 cases.[24] Considering the fact that Rehnquist and Burger (in that order) had been considered the most conservative members of the Court and that they only voted alike in 118 cases presented this term, it would seem that Justice O'Connor has firmly established herself in the conservative bloc. Further evidence of this comes from the fact that Rehnquist and Brennan (the Court's most liberal members) took opposite sides in 70 caes and that of these cases O'Connor took part in 66, voting 51 times with Rehnquist and 15 times with Brennan.

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[23] Ramah Navajo School Bd., Inc. v. New Mexico Bureau of Revenue, 50 U.S.L.W. 5101 (U.S. 1982).

[24] Greenhouse, *Fragile Coalitions Shaped Court's Key Decisions*, New York Times, July 18, 1982.

Reviewing only those cases critiqued as dealing either directly or indirectly with education one finds only three (*American Tobacco Co. v. Patterson; Mississippi University for Women v. Hogan;* and *Valley Forge Christian College v. Americans United for Separation of Church and State*) where Justice O'Connor's vote made a difference in the outcome of the case. In *American Tobacco Co. v. Patterson* she voted to allow employment discrimination produced by a seniority system as long as that discrimination was not an intent of the system. Voting again with the 5-4 majority in *Mississippi University for Women v. Hogan*, she held that federal law prohibited state-run schools from discriminating in admittance because of gender. Finally, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* Justice O'Connor upheld the right of the federal government to give surplus property to church-affiliated schools. In the first and third of these cases she voted with the four other most traditionally conservative members of the Court. In the *Mississippi* case the vote was scattered, and O'Connor was joined by two moderates (Stevens, White) and the two most liberal (Brennan, Marshall) members.

In conclusion it would seem that the newest Justice is best classified as conservative, as an extremely vehement champion of states' rights, and is a firm believer in the elimination of sexual discrimination in those areas supported by public funds.

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Recent Decisions on Rights of the Handicapped

WARREN L. KREUNEN

Warren L. Kreunen is a partner in the law firm of von Briesen and Redmond, Milwaukee, Wisconsin. He received his B.S. and J.D. degrees from the University of Wisconsin. Since 1963, a substantial part of Mr. Kreunen's practice has been representing school districts in Southeastern Wisconsin. He is a frequent participant as a speaker at seminars and programs involving all aspects of school law. He has served as the president of the Wisconsin School Attorneys Association and he is a member of the National School Board Association's Council of School Attorneys. He is also a member of the American Bar Association's Committee on Public Employee Labor Relations and its Committee on Public Education.

Perhaps the title of this chapter should be, Education of the Handicapped Law after *Rowley*.[1] No case in the field of special education has received more publicity than *Rowley*. We read about it in the local newspaper, in *Time* and *Newsweek*, and in many other periodicals, including those published for educators and lawyers. The appeal of the *Rowley* case to the educator or lawyer is easy to understand. It was the first case concerning The Education For All Handicapped Children Act of 1975 to be considered by the United States Supreme Court. In addition to being first, the case went to the heart of the Act by asking what is meant by the act's requirement to furnish a free, appropriate public education to handicapped children.

The appeal of the *Rowley* case to the general public was probably heightened because the subject of the case, Amy Rowley, is a bright, eager, child who is succeeding in spite of her handicap. Moreover, because Amy's hearing is impaired and she wanted an interpreter, it was an easy issue for the public to understand. Does Amy get an interpreter or doesn't she? News articles pointed out that Amy's parents were also deaf and when the case was argued, attention focused on Amy's attorney, who is also deaf, and the special provisions that were made in the courtroom so that he could present Amy's case to the Supreme Court.

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[1] Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034 (1982).

Perhaps the most reliable indicator of *Rowley's* importance is the fact that the *Education for the Handicapped Law Report* contains nine briefs filed in the *Rowley* appeal to the Supreme Court, a special report on the *Rowley* argument, an analysis on the aftermath of *Rowley* and, of course, the Supreme Court decision itself.

As previously noted, Amy's parents are both deaf. They are also college graduates and her mother is a certified teacher of the deaf. After learning that Amy was deaf, her parents trained her in various methods of communication including lip reading and several forms of visual signs.

Amy entered school as a kindergarten pupil in September of 1977. She was the school's only deaf pupil and was placed in a regular class. A number of teachers took a sign language course to better communicate with her. A teletype was installed in the school administrator's office to facilitate communication with Amy's parents. Amy's hearing was tested and she was found to have good residual hearing in the lower frequencies where vowel sounds are distinguished. She was furnished with a wireless FM hearing aid which amplified sound spoken into a microphone.

Amy's parents requested a sign language interpreter. An interpreter was placed in her class for a trial period. The interpreter submitted a report which concluded that Amy did not need his services.

Amy began first grade in a regular classroom in September of 1978. In October, an "Individualized Educational Program," hereafter called an IEP, was developed which provided: (a) continued use of the wireless FM hearing aid; (b) the services of a teacher for the deaf one hour each day; and (c) the services of a speech therapist for three one-hour sessions each week. The IEP did not provide for a sign language interpreter which her parents had requested.

Amy's parents objected to the IEP because it did not provide for the services of a sign language interpreter and demanded a hearing. The hearing officer found that "Amy was achieving educationally, academically and socially" without an interpreter and none was needed. The Rowleys appealed to the New York State Commissioner of Education who affirmed the decision of the hearing officer.

In April of 1979, the Rowleys began an action against the school district in the United States District Court for the Southern District of New York.[2] While the lawsuit was pending, Amy began second grade. About four months later, on December 28, 1979, the district court issued an order reversing the Commissioner of Education and ordering the school district and the Commissioner to provide Amy with the services of a certified interpreter for the deaf.

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[2] *Rowley*, 483 F. Supp. 528 (S.D.N.Y. 1980).

The district court found that Amy is a well-adjusted child who has developed an extraordinary rapport with her teachers. She performs above the median in her class and advances easily from grade to grade. However, she understands only about 60 percent of the oral communication in the classroom and thus, is not learning as much or performing as well as she would have without her handicap.

The court defined a "free appropriate public education" as one in which each handicapped child is given an opportunity to achieve his or her full potential commensurate with the opportunity provided to nonhandicapped children.

The Rowleys argued that Amy was entitled to understand 100 percent of the oral communication in the classroom and that she would be able to do so with the services of an interpreter. Applying its standard for a free appropriate education, the court agreed with the Rowleys and found that the presence of an interpreter was necessary to bring Amy's educational opportunity up to the level of the educational opportunity being offered to her fellow students.

The school district and the Commissioner appealed to the Court of Appeals for the Second Circuit which affirmed the district court by a split decision rendered in July of 1980.[3]

Soon after Amy entered third grade, her parents filed a petition for a writ of certiorari to the Supreme Court; the writ was granted.

Amy's appeal was vigorously briefed. Her attorney framed the issue this way. "Despite her deafness, is Amy entitled to the same opportunity as other children to make a success out of her life." And, in a footnote, Amy's lawyer observed tht the role of one school district expert was to advise the school district on "the minimum service the school district could get away with . . . ."

The *Rowley* appeal was argued in March of 1982 and decided shortly after Amy Rowley completed fourth grade. Justice Rehnquist wrote the majority opinion of the Court which began by reviewing the history and language of The Education For All Handicapped Children Act. He found that in creating this legislation the primary goal of Congress was to identify and evaluate handicapped children, and to provide them with access to a free public education which is sufficient to confer some educational benefit upon them. The critical question is how much educational benefit is necessary to meet the requirements of the Act. The court does not supply a simple or universal formula for making this determination.

In essence the court held that a handicapped child is receiving a free appropriate public education if the child is receiving personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. If the handicapped child is educated in the regular classroom, then the IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

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[3] *Rowley*, 632 F.2d 945 (2nd Cir. 1980).

Justice Rehnquist takes care to note that a handicapped child who is advancing from grade to grade in a regular classroom is not automatically receiving a free appropriate education. On the other hand, the standard is that the IEP be "reasonably calculated" to assist a child to advance from grade to grade; there is no requirement that the child actually advance from grade to grade.

Having phrased a definition for a free appropriate public education, Justice Rehnquist moves to the second issue in the case, namely, what is the role of state and federal courts in exercising the review granted by section 1415 of the Act? Under section 1415 a party aggrieved by the finding and decision of a state administrative hearing may bring a civil action in state or federal court regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." Further, section 1415 provides that the reviewing court "shall receive the record of the administrative proceeding, shall hear additional evidence at the request of a party and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." To most of us, this appears to be a broad grant of discretion to the reviewing court. However, Justice Rehnquist found it to be significant and limiting that Congress titled section 1415 "Procedural Safeguards." From this point forward, Justice Rehnquist's opinion becomes a dream come true for lawyers who represent school districts.

The opinion states that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." The opinion also states that "[T]he fact that section 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings." Reviewing his handiwork and finding it unfinished, Justice Rehnquist added that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." And, he adds "[W]e previously have cautioned that courts lack the specialized knowledge and experience necessary to resolve 'persistent and difficult questions of educational policy.' "

Judge Rehnquist concludes that a reviewing court's inquiry in suits brought under section 1415 is twofold. "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more." In a footnote, Justice Rehnquist repeats that an important factor in determining educational benefit for a handicapped child who is being educated in the regular classroom, is the achievement of passing marks and advancement from grade to grade.

Where does this leave Amy Rowley as she enters fifth grade? As the press reported Amy did not get her interpreter. Justice Rehnquist applied the Court's twofold inquiry and found that there was no evidence that the school district had failed to comply with the requirements and procedures of the Act. Secondly, the Court found that Amy was receiving specialized instruction and related services and was performing above average in a regular class and was advancing easily from grade to grade. These factors were dispositive of the case and the court of appeals was reversed.

Justice White, with two Justices joining, wrote a dissent which did not take kindly to the majority opinion. The dissent characterized Justice Rehnquist's standard of review as being one which would be satisfied if Amy Rowley were given a teacher with a loud voice, "for she would benefit from that service." Justice White would have affirmed the Second Circuit court opinion in all respects.

Justice Blackmun concurred with the result but stressed that the real test was whether, reviewing her educational program as a whole, Amy Rowley had been provided with an educational opportunity that was substantially the same as that given to her nonhandicapped classmates. Because Amy had been furnished with considerably more than a teacher with a loud voice, Justice Blackmun believed that the standard had been satisfied and he agreed that the judgment of the court of appeals should be reversed.

We should not be too surprised with the approach taken by Justice Rehnquist in framing a judicial standard to determine whether a handicapped child is receiving a free appropriate public education. Fourteen months earlier Justice Rehnquist wrote the majority opinion in *Pennhurst State School v. Halderman.*[4] *Pennhurst* was, in a sense, a precursor to the decision in *Rowley*. Both cases involved the interpretation of legislation that Congress enacted pursuant to its spending power. In *Pennhurst* the Court held that when Congress imposes conditions on the states in return for federal funds, it must impose those conditions unambiguously. The search in *Rowley*, therefore, was a search for a judicial standard for a free appropriate public education which was not higher than that unambiguously expressed by Congress. What is ambiguous to some, however, is clear to others as demonstrated by the concurring and dissenting opinions in *Rowley*.

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[4] 451 U.S. 1 (1981).

On July 2, 1982, four days after deciding *Rowley*, the United States Supreme Court issued a per curiam opinion upholding the right of a school board to construe its own rules in a disciplinary matter involving a student named Pete McCluskey who had been expelled because of intoxication during school hours.[5] This opinion is significant only because it was issued in a trivial case for the apparent purpose of reminding federal courts that it is not their role to interfere with school boards in the proper construction of school regulations. The opinion pointedly states that "the district court and the court of appeals plainly erred in replacing the board's construction of section 11 [its rules] with their own notions under the facts of this case." This sounds strikingly similar to the language in *Rowley* which admonishes reviewing courts that the language of section 1415 is not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." The Supreme Court seems to be saying, as plainly as it can, that it is the role of school boards and not the federal courts to administer our primary and secondary schools.

On the same day the Supreme Court decided *McCluskey*, it also issued a memorandum decision in the case of *Springdale School District No. 50 of Washington County v. Sherry Grace.*[6] *Springdale*, like *Rowley*, involves the education of a deaf child, Sherry Grace. Sherry, unlike Amy Rowley however, was not easily advancing from grade to grade. The definition of a free appropriate public education created by the district judge in *Rowley* was adopted by the Eighth Circuit Court of Appeals when it decided *Springdale*. In both *Springdale* and *Rowley* it was the school district which petitioned for a writ of certiorari after losing in the court of appeals. There is one significant difference in the two cases; in *Springdale* it is the school district rather than the parents that is seeking to improve the student's educational climate. The Supreme Court vacated the judgment of the Eighth Circuit Court of Appeals in *Springdale* and remanded the case to the court of appeals "for further consideration in light of" the opinion in *Rowley*.

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[5] Board of Educ. of Rogers, Arkansas v. M cCluskey, 102 S. Ct. 3469 (1982).

[6] 102 S. Ct. 3504 (1982), *vacated mem. and remanded.*

Sherry Grace, according to the Eighth Circuit Court of Appeals, has made little academic progress. She is mainstreamed during several periods of the day with non-handicapped children. The court acknowledged that the school district had "thoroughly proved" that the Arkansas School for the Deaf would provide Sherry with a better education.

Considering Justice Rehnquist's emphasis on academic progress, one might conclude that the Eighth Circuit Court of Appeals would now order that Sherry Grace be educated at the Arkansas School for the Deaf. But this is not the case, the Eighth Circuit Court of Appeals has affirmed its prior decision.

One month after the *Rowley* decision, a Wisconsin Circuit Court decided a case involving a student named Michael Frank.[7] Michael Frank is a sixteen-year-old student with a severe hearing impairment. Until the spring of 1980, he was enrolled in a private residential school devoted to the education of deaf students through the exclusive use of oral instruction. Upon his transfer to the Madison school system, he was placed in regular education classes and furnished with an oral interpreter. After an evaluation, a multidisciplinary team recommended that Michael be placed in a class where he would be exposed to total communication techniques. Michael's parents objected and demanded a hearing. A decision in favor of Michael's parents by the hearing officer was later reversed by the State Superintendent of Public Instruction. Michael's parents then requested judicial review.

The court analyzed the recent *Rowley* decision and found that the court should make two inquiries: (1) Has the school district complied with the procedures set forth in the Act, and (2) is the IEP developed for Michael Frank "reasonably calculated" to enable him to receive educational benefits. The court then made this observation: "Frankly, the majority decision in *Rowley* is devastating to the petitioners' [parents of Michael Frank] position, and it is that decision which this court is required to follow." Following this observation, the court concluded that the school district had shown that it had complied with the procedures set forth in the Act and that the IEP which it developed for Michael Frank was reasonably calculated to enable him to receive educational benefits. The court then ordered that the IEP developed by the school district for Michael Frank be implemented.

Two months after the *Rowley* decision the United States District Court for Massachusetts had an opportunity to apply that decision in a case involving an eighteen-year-old student named Margaret Lang.[8]

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[7] Frank v. Grover, No. 81-CV-6003 (Wis. Cir. Ct. 1982), EHLR 554:148.

[8] Lang v. Braintree School Comm., 545 F. Supp. 1221 (D. Mass. 1982), EHLR 554:161.

Margaret had been diagnosed as mentally retarded, mentally ill, and epileptic. When she was in first grade, the Boston Public School system determined that she needed special classes and sent her, at public expense, to a private day school. After Margaret's family moved to Braintree, a new IEP was developed which provided for a program in the public school. Margaret's parents objected and a hearing was initiated. The hearing officer issued an opinion finding that the amended IEP prepared by the school district was appropriate for Margaret.

The first issue addressed by the reviewing court was the definition of an appropriate education. The court quoted several sections of the opinion in *Rowley*, concluding that "where the state is providing the child with an education that is of some benefit to her and it utilizing a minimally acceptable educational approach this court may not interfere." The court found that the public school was "clearly offering Margaret an educational program designed to benefit her . . . ." The court concluded that since the IEP developed for Margaret will provide her with an education which benefits her within the meaning of the Act, the IEP must be deemed satisfactory.

In a different proceeding in Massachusetts, a hearing officer ruled that a school district's program did not meet the standard enunciated in the *Rowley* decision.[9] This case involved a six-year-old child with a significant hearing impairment. She attends a private school and uses total communication techniques. Her parents opposed a proposed placement change to a less restrictive environment in the public school. The school district argued that its proposed placement would meet the standard for an appropriate education as recently defined in *Rowley*. The hearing officer responded by noting that his decision rested on Massachusetts as well as federal law and the *Rowley* decision is only controlling with reference to federal law. And second, even under the *Rowley* standard of appropriateness, the hearing officer found the proposed placement unacceptable given the extent and multiplicity of the student's deficits and special needs. Finally, the hearing officer distinguished the case before him from the *Rowley* decision, noting that unlike Amy Rowley, the child in question was not advancing easily from grade to grade. As the hearing officer observed, the *Rowley* case stressed that its analysis was confined to the particular facts presented; the hearing officer was able to clearly distinguish the facts before him from those in *Rowley*.

One month after *Rowley* the North Carolina Court of Appeals considered a case in which the parents of a student argued that the assessment, evaluation, and placement of their child did not comply with either federal or state regulations.[10] The court interpreted the requirements of federal law by citing and quoting *Rowley*. However, it then turned its attention to state law and found that it was the intent of the North Carolina General Assembly to give each handicapped child "an opportunity to achieve his full potential commensurate with that given other children." This is essentially the same standard adopted by the district court and court of appeals in *Rowley*. In view of the *Rowley* decision, we may expect that other courts, particularly state courts, will much more closely examine the requirements of state statutes when considering the appropriateness of educational placements for handicapped children. Incidentally, North Carolina's higher standard did not benefit the parents since the court found that the school system had fulfilled its obligation to furnish a free appropriate education to their child under the higher state standard.

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[9] *In re* Brokton Public Schools, No. 5532 (MA SEA DEC 1982), EHLR 504:128.

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The last decision interpreting *Rowley* is one by a Michigan review officer entered in August 1982.[11] This case involved a nine-year-old girl whose parents requested a hearing to determine whether their hearing impaired daughter should have cued speech as an aid to communication in the regular classroom. The local hearing officer ruled in favor of the parents and the school district appealed. The issue on the appeal was whether it was necessary to provide the student with cued speech services in the regular classroom to enable her to receive a free appropriate public education designed to develop her maximum potential. As happened in the North Carolina court, the reviewing officer concluded that the state standard for a free appropriate education is higher than that required by federal law, as federal law is defined by *Rowley*. The reviewing officer found that the higher standard had been met and rendered a decision in favor of the school district.

In view of the title of this chapter, you may well ask whether there are decisions, other than *Rowley* and its progeny, which merit our attention. Most cases decided in the past several months are not particularly noteworthy. There are a number of cases involving attorneys fees and damages, including one which awarded prejudgment interest on the recovery of tuition reimbursement.[12]

While interesting, this decision does not appear to have lasting significance. The law on education of the handicapped is gradually coming of age and many decisions now being rendered closely follow the pattern of decisions already decided on the same subject. One is sometimes tempted to cite a decision merely because of one's moral approval of the language and holding of the decision. A decision by the Commissioner of Education in New York falls in this category.[13]

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[10] Harrell v. Wilson Cty. Schools, 293 S.E.2d 687 (N.C. Ct. App. 1982), EHLR 554:125.

[11] *In re* Traverse Bay Area Intermediate School Dist. No. 82-0143 (MI SEA DEC 1982), EHLR 504:140.

[12] Fallon v. Board of Educ. of the Scotch Plains-Fanwood School Dist. (N.J. 1982), EHLR 504:144.

In this case, the Commissioner of Education ruled that a teenage boy who displayed a childish rejection of school, a refusal to learn, hostility to school authorities, and who gave wise answers to test questions was not suffering from a psychological disability that required the provision of special educational services. The Commissioner noted that the boy had trouble with proverbs and observed that the appeal illustrates that "you can lead a horse to water, but you cannot make him drink."

In *Rowley*, the court noted that only the State of New Mexico did not participate in the funding provided by The Education For All Handicapped Children Act. One month before the *Rowley* decision, the Tenth Circuit Court of Appeals reversed and remanded for further proceedings the case of *New Mexico Association for Retarded Citizens v. State of New Mexico*.[14] This case arose when the New Mexico Association for Retarded Citizens commenced a class action against the State of New Mexico on behalf of children of elementary and secondary school age who, it alleged, were being denied federally guaranteed special education services.

The action was brought under section 504 of the Rehabilitation Act of 1973 which provides that: "[N]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." Essentially this is a civil rights statute prohibiting discrimination against the handicapped. It does not provide funding but it does apply to all school districts who directly or indirectly receive federal funds.

After a bench trial, the federal district court concluded that the State of New Mexico had violated section 504 by discriminating against handicapped children. This decision was made against a backdrop of rather extensive compliance regulations issued to implement the provisions of section 504. The Supreme Court's decision in *Southeastern Community College v. Davis*,[15] cast serious doubt upon the validity of these regulations, however, particulary if the regulations were broadly interpreted. The Supreme Court concluded that the fundamental purpose of section 504 was to prohibit discrimination against the handicapped, not to mandate affirmative relief.

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[13] *In re* New York City School Dist., No. 10890 (NY SEA DEC 1982), EHLR 504:132.
[14] 678 F.2d 847 (10th Cir. 1982).
[15] 443 U.S. 397 (1979).

In view of Justice Rehnquist's decision in *Rowley* the standards imposed by section 504 may be as stringent as those created by The Education For All Handicapped Children Act. For example, the court of appeals in the *New Mexico* case found that under section 504 special education programs must serve handicapped students in the same way that traditional educational programs serve nonhandicapped students. This standard sounds very close to the equal opportunity standard adopted by the district court and court of appeals in *Rowley*.

The court of appeals in the *New Mexico* case concluded that New Mexico is obligated by federal law to provide its pre-college age children with an "appropriate education." This brings us back to the fundamental question raised in *Rowley*, when is an education "appropriate"?

Since the court of appeals found that the trial court in the New Mexico case had failed to consider the *Southeastern Community College* guidelines in its opinion and order, the case was remanded.

The *New Mexico* case is concerned with the application of section 504 and not with the Education For All Handicapped Children Act. Nevertheless, it is likely that the *Rowley* case, which did not deal with section 504, will influence the result of the litigation in New Mexico. The reason *Rowley* may influence the *New Mexico* litigation is that the court will be reluctant to impose a greater duty on the state to educacate its handicapped children under section 504 than would be required had the state elected to receive funding for this purpose under the Education For All Handicapped Children Act.

In the *New Mexico* case, as in many others, the interplay of section 504 with the Education For All Handicapped Children Act will be difficult for the courts to resolve.

In its analysis on the aftermath of *Rowley*, the *Education for the Handicapped Law Report* concludes that the *Rowley* decision "leaves the special education community with business as usual." The business of special education will continue but as the Wisconsin case has already demonstrated, it will not be as usual. The twofold inquiry prescribed by *Rowley* will have a substantial impact on all special education appeals.

To some degree there will be a shift in emphasis from substance to procedure. If the state has complied with the procedures of the Act the only remaining inquiry is whether the IEP developed for the handicapped student is "reasonably calculated" to furnish the student with an educational benefit. The sufficiency of an educational benefit in the case of a student educated in the regular classroom will be largely determined by that child's academic progress from grade to grade.

Justice Rehnquist confined his analysis of educational benefit in *Rowley* to the facts presented on that appeal. What analysis will courts develop to apply to cases in which children are severely handicapped and not placed in the regular classroom? While *Rowley* does not address this situation, it does seem to indicate that a handicapped child in any setting must have an IEP which is reasonably calculated to allow that child to progress in his education at a rate which is considered satisfactory by educators in light of the child's handicap.

Finally, the courts will, with some reluctance, give greater deference to the decisions of local and state educators on questions of education policy and teaching methods. For example, the question of teaching the hearing impaired by the oral communication only method as opposed to total communication is a decision for educators and not the courts, according to Justice Rehnquist.

The application of the language in *Rowley* will raise questions that are not answered in the opinion. For example, should a court show more deference to a hearing officer's decision if that officer is an educator rather than a lawyer. To whom should a court give deference if state educational policy conflicts with policy adopted by a local school district. Whatever the answers to these and other similar questions, the direction set by *Rowley* is clear; the formulation and implementation of educational policy for handicapped children is being returned from the courts to local and state education authorities.

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Termination of Teacher Contracts in Canada

ALLEN KEITH HARRISON

Allen Keith Harrison received his doctorate from the University of Alberta, specializing in educational administration supplemented with courses in law. A former teacher and school administrator in Alberta, Dr. Harrison is currently with the Alberta Teachers' Association. He has participated in several conferences and seminars. He has authored many monographs and articles dealing with rights and responsibilities of teachers as well as researching school law communications and problems.

"Ignorance of the law is no excuse" is an often used phrase. While that statement is true it often is unreasonable to expect laymen to know everything about all aspects of current legislation. It is reasonable however, to expect that an individual will acquaint himself with legislation that is relevant to his occupation. Knowledge of the law as it relates to termination of teachers' contracts may prevent unnecessary court action for teacher and employer. Disputes over termination of teachers' contracts are inevitable. Inherent conflict exists between the interest of the employer to exercise as much control as possible and the employee, on the other hand, who endeavours to protect his security. The employer normally maintains that it is his management prerogative to discharge an employee while the employee usually sees termination as unjustified punishment.

CONSTITUTION 1867

The framers of the Canadian Constitution were concerned with division of powers between the proposed federal government and the existing regional governments. Allocation of powers had to take into account responsibilities, such as education, that the colonies had already assumed.

The Constitution granted sovereign powers over education to provincial legislatures. By doing so, it set out the powers of the provincial governments, established some concurrent powers, and left the rest to the federal government.

Public education in Canada is a provincial responsibility. The legislative power is derived directly from section 93 of the Constitution[1] which reads as follows:

> In and for each province the Legislature may exclusively make laws in relation to Education, subject to and according to the following provisions: "Nothing in any such law shall prejudically affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."

Section 93 places control of education with the provinces and at the same time protects rights of religious minorities and makes provisions for redress if these rights are violated. Section 93 also establishes legal and constitutional contexts for public education in Canada by attempting to provide a solution to two crucial issues; the relationships between church and state, and the relationship between federal and provincial governments in Canadian education. Although education is not under the direct control of the federal government, it does have an interest in education and is empowered to enact legislation if provincial legislation contravenes provisions in Section 93 or detracts from a national purpose.

CONTRACT LAW

In addition to legislative control over education, the common law has established relationships between employer and employee. Contracts of employment between employer and employee were determined by legislative enactments and the common law.

Prior to the middle of the nineteenth century, law relating to employment was almost entirely represented by a body of common law rules defining the relationships of master and servant. At that time, the master (employer) had a separate contract with each of his servants (employees). The individual contract is still commonplace today and the law of master and servant still has an important influence on the relationship between employers and employees. The relation of master and servant is established in contract and gives the employer authority to direct and control the work of the employee. The employee then makes himself available to the employer, during his hours of employment, to perform the services for which he is hired. If either party to the contract agreement expresses a desire to terminate the contract he may do so by mutual agreement, according to common law or according to statute.

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[1] Const. Act 1867 § 93 (Ottawa 1981).

TEACHER TENURE

Tenure has been described as a form of job security. To be without job security means that a contract of employment is subject to termination without just cause and without conformance to any procedures or to the rules of natural justice. Tenure protects teachers against indiscriminate termination by their employer. Acceptable reasons and procedures for releasing teachers are established in statutes or precedents set in courts. McCurdy defined tenure as "a set of rights conveyed and protected by law whereby a teacher cannot be dismissed from his position except under provisions laid down by statute."[2]

Czuboka summarizes United States cases:

> Using examples from the U.S. experience it has been established that tenured teachers may be released for not living up to reasonable conditions of leaves-of-absence; for refusing to cooperate with classroom supervisors; for out-of-school behavior which is socially unacceptable in the community; and for refusing to up-grade teaching qualifications by means of in-service training. Conversely, it seems that tenured teachers may not be released for wearing beards; for being "controversial" persons; for engaging in private homosexual acts; or for refusing to carry out extra curricular duties which are not directly related to the school program.[3]

In Canada, a teacher is deemed to have tenure after serving a probationary period which varies from one province or territory to another. The basic purpose of tenure is to protect teachers who have successfully completed their probationary period from unjust termination of contract for unfounded personal, political or religious reasons during competent performance of their duties. A tenured teacher has rights conveyed by law and cannot be terminated except under procedures contained in statutes, regulations or collective agreements.

The concept of tenure as job security is widely held. There is no such thing as total job security, Kerans points out that, "it would be more correct to talk, not about tenure but how much tenure."[4] One question addressed in this chapter focuses on the amount of tenure possessed by Canadian teachers. One factor that contributes to the amount of tenure possessed by teachers is the concept of natural justice.

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[2] S. McCurdy, The Legal Status of the Canadian Teacher at 23 (MacMillan Co. of Can. Ltd., Toronto 1968).

[3] M. Czuboka, An Examination of Tenure: The Status of Tenured Teachers in Manitoba at 13.

[4] R. Kerans, The Last Word, The Board of Reference Under the Alberta School Act at 4.

NATURAL JUSTICE

The Board of Reference, or other tribunal established to hear teacher termination cases, acts as an administrative tribunal that exercises a quasi-judicial function. In conducting its affairs an administrative tribunal must do so in accordance with the rules of natural justice.

Gall outlines the two basic rules of natural justice:

> 1. The *audi alteram partem* rule in literal translation dictates that both parties to a dispute must be heard. One requirement under this rule is that there must be a fair hearing. Included therein are the related notions that each party has a right to receive notice of a hearing, and, during the course of a hearing, each party has the right to rebut the evidence adduced, to cross examine witnesses and to obtain legal representation, if desired.
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> 2. The *nemo judex in causa sua* rule includes, essentially the notion that all forms of bias must be excluded from the considerations of administrative tribunals.[5]

If there is to be a fair hearing, the decision maker(s) must hear both sides, give each party an opportunity to state its case and give notice to any person who may be affected by the decision. The right to a hearing is not necessarily a right to a personal hearing before the decision maker(s). The person affected may be represented at a hearing or may make a written presentation.

Proof of bias is very difficult in most cases. Decision makers may be considered to have bias if rational persons believed that bias existed. Absolute proof of bias is not necessary, however, there does have to be a strong possibility of bias existence. Decision makers are automatically believed to have bias if they have a monetary interest in the outcome of the case.

In addition to the basic rules of natural justice, advance notice of the reasons for termination are usually required. Also, reasons for termination must be based on an inquiry.

PRECEDENT AND STARE DECISIS

According to the doctrine of stare decisis, judges in a common law system have to follow precedent cases decided in a higher court. After a case is heard and a decision reached, that decision becomes a precedent for judges in lower courts in dealing with similar fact situations. However, no two cases are ever the same as they can be distinguished as to the facts of the case. The problem becomes one of locating relevant cases that lie very close to the situation and attempting to show that the finding of the earlier cases should be followed.

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[5] G. GALL, THE CANADIAN LEGAL SYSTEM at 265.

The strength of a case proposed as precedent depends to a large extent upon the court in which it was tried. Cases tried in the Supreme Court of Canada, for example, provide binding precedent for all other courts in the country. A finding of a provincial court of appeal would be persuasive on other provincial common law courts of appeal and binding on all other lower courts within the province.

In a civil law system, such as Quebec, the civil code and not cases are most important. Judges in a civil code system are not bound by precedents and may differ in their interpretation of the civil code. However, in practice, judges do, in fact, follow previously decided cases because of the necessity to provide an element of predictability in the law.

The degree of persuasiveness is somewhat speculative and could vary according to the matching of similar fact situations. Appeal tribunals are bound by teacher termination decisions made by a higher court within the province or territory. Decisions by appeal tribunals, provincial courts or district courts in other common law provinces and territories would be persuasive on the Alberta Board of Reference.

MEANS OF CHALLENGING TERMINATION DECISIONS

Statutes establishing four out of twelve Canadian tribunals do allow an appeal to the tribunal's decision. In such cases the appeal is directed to the court specified in the statute or to the next highest court.

Statutes establishing ten out of twelve Canadian tribunals state that there is no appeal to tribunal decisions. Even when the statute does prohibit an appeal, it is sometimes possible to challenge the decision by way of judicial review.

Courts will intervene if tribunals lack or exceed jurisdiction. Courts establish criteria for determining breaches of procedural requirements. Failure to comply with a statutory duty to give prior notice, or hold a hearing or make due inquiry or consider objectives in the course of exercising discretionary powers affecting individuals rights will always be reviewed by the courts.

The courts will, by way of certiorari, review decisions of tribunals where there is evidence of a breach of the rules of natural justice. Generally speaking, it is expected that decisions made by judicial or quasi-judicial tribunals should be made in a fair and reasonable manner. As mentioned previously the two requirements of natural justice are that a fair hearing be held and there must be no bias in deciding the case. The principles of natural justice are concerned with procedural matters, not with matters of fact.

If it can be shown that the tribunal abused its power or rendered its decision in bad faith, there are grounds for judicial review by way of an application for an injunction which may be brought by a notice of motion or application for declaration which is commenced by a statement of claim.

In the event that there is evidence to indicate that there was an error of law on the face of the record, it is a ground for judicial review. This ground has to do with whether the tribunal made a mistake about how the law or the evidence should be used, and whether that mistake was obvious. A court can examine the record of the hearing to see what evidence the decision was based upon. If the court finds from the record that there was no obvious evidence to reasonably support the decision, then it will find that decision was incorrect in that there was an error of law on the face of the record. In such a case, the court may grant writ of certiorari and quash the tribunal's decision.

If a public official, whether serving on a tribunal or otherwise, is not performing or refuses to perform a statutory duty, a writ of mandamus may be made to compel that person to perform a required duty.

Judicial review of decisions is a means of control over tribunals. Even when an enabling statute establishing the tribunal contains a privative clause prohibiting review of decisions made by the tribunal, courts of superior jurisdiction will be receptive to the process of judicial review. Courts not only play a great part in reconciling parties to a dispute but also perform a supervisory role to see that quasi-judicial tribunals observe certain minimal procedural standards and stay within their jurisdictional boundaries.

TECHNICAL CASES

Prefontaine,[6] a Saskatchewan case, serves as an example of a challenge to a decision with regard to termination of a teacher's contract. Mr. Prefontaine's contract was terminated under The Teacher Tenure Act.[7] The school board gave reasons for the termination, held a hearing for the teacher but did not agree to be bound by the decision of the Conciliation Board. Following the hearing by the Conciliation Board, the teacher commenced an action against the school board for wrongful dismissal. On a preliminary point of law, the question was whether the plaintiff's right to the action was taken away by The Teacher Tenure Act.[8] In giving reasons for judgment, Mr. Justice

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[6] Prefontaine v. Regina East School Unit No. 20, unreported (Can. Ct. Q.B. Sask. 1976).

[7] Teacher Tenure Act, REV. STAT. SASK. (1965) c.203.

[8] *Id.*

MacLeod noted that The Act[9] provides a procedure designed to resolve disputes but did not provide for a remedy except by mutual agreement. In answering the point of law, Mr. Justice MacLeod ruled that "the plaintiff, in pursuing his remedy under The Teacher Tenure Act,[10] where the school board does not agree to be bound by the conciliation provided in The Act,[11] does not thereby exhaust all remedies open to him at law."

In another Saskatchewan case,[12] Mr. Justice Collinton, speaking on behalf of the court, suggested that the school board's power is administrative rather than judicial and that certiorari does not lie to review the decision. The court went on to say that the school board's failure to comply with statutes respecting the form of notice and reasons may render the board's decision illegal and if so, the remedy is an action for wrongful dismissal.

However, courts often do not agree with one another. When the *Prefontaine* case was appealed to the Court of Queen's Bench for Saskatchewan, Mr. Justice Maher in judgment, suggested that the school board "acted judicially in arriving at its decision."

In an Alberta case,[13] the Board of Reference did not uphold the decision of the school board to terminate Mrs. Elliott's contract because there had been a breach of the rules of natural justice. However, the school board made an application by way of certiorari to quash the Board of Reference decision. Mr. Justice Lieberman, of the Supreme Court of Alberta, found that the school board exercised a quasi-judicial function and that the rules of natural justice must be observed. Accordingly, the application was dismissed.

In another Alberta case,[14] Mr. Penner requested that the school board hold a public hearing with respect to his intended termination. The school board refused. Penner applied for an order in the way of mandamus to force the school board to hold a public hearing. Mr. Justice Cavanagh of the Trial Division of Edmonton District Court heard the application. In judgment, Mr. Justice Cavanagh said:

> I would emphasize that the relationships between the parties is one of master and servant. The contract of service between them would be terminable by either party under the common

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Regina v. Board of Trustees of Estevan Collegiate Inst., 16 D.L.R.3d 570 (Can. Ct. App. Sask. 1970).

[13] Elliott v. Board of Trustees of the St. Albert Protestant School Bd., unreported (Can. 1972).

[14] Penner v. Board of Trustees of Edmonton Pub. School Dist., 5 W.W.R. 762 (Can. Alta. 1974).

> law. Section 78 of The School Act places certain restrictions on the Board as master. It may still terminate the contract of service but the section requires that it give 30 days written notice of its intention to do so. It must also specify the reasons for termination. Finally, it must act reasonably.
>
> The letter of November 30th is not a notice of termination under Section 78. It is a notice of a proposed hearing to determine whether a notice of termination should be given .... The Board has said, "Here is the evidence we now have which indicates we should give a termination notice. We propose to hear more and ask you to come and hear it too and then we will hear your reply."
>
> I construe the stated intention of the Board to be an attempt to act reasonably as required by the statute. I believe the board is going much further than it needs to in holding a hearing .... This is not a board sitting as a tribunal to decide between two parties. This is a master trying to decide whether to dismiss a servant.

The judgment of Mr. Justice Cavanagh appears to be a return to the concept of the law of master and servant and that a school board in deciding a teacher's contract is not acting as a tribunal. However, Cavanagh concluded that there were not facts in support of making the hearing public thus, the application for mandamus was dismissed.

PROCEDURAL CASES

In some cases, alleged improper procedure is the central issue. If there is a procedural dispute then, the merits of the case are seldom argued. This is especially true when the procedural objections are upheld. The following cases serve as examples of procedural objections in teacher termination cases.

In a Quebec case,[15] the Supreme Court of Canada held that a tenured teacher may request reasons for termination. If that teacher was not satisfied with reasons stated for termination, he could submit his complaint to arbitration. Where the arbitration board finds that the termination was null and void and where the school board refused to re-engage the teacher, the teacher is entitled to succeed in an action for payment of a year's salary.

In another Quebec case,[16] Mr. Guedj claimed that proper procedures were not followed because the school board delegated authority to an executive committee to terminate his contract. The Arbitration Board held that the law did not prohibit the delegation of any power or authority and dismissed the appeal.

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[15] Belanger v. Les Commissaires D'Ecoles Pour la Municipalite Scolaire De St. Gervais, Comte De Bellechasse, 16 D.L.R.3d 602 (Can. 1970).

[16] Syndicat Des Enseignants De L'Estrie (Hubert Guedj) c. Commission Scolaire Regionale De L'Estrie, unreported (1976).

A similar case,[17] occurred in Alberta. Penner had been granted a hearing by the superintendent of schools but not by the conference committee of the school board, which was charged with confirming the termination. The Board of Reference held that the procedure of delegating power of termination to the superintendent subject to confirmation by the conference committee of the board, failed to observe the rules of natural justice and Penner was reinstated. The authority of the school board to delegate some of its power to a committee was not questioned.

In another Alberta Case,[18] proper notice prior to the school board hearing was the subject of proper procedure. Mr. Balachandra was given notice of intent to terminate his designation as principal and termination of his contract of employment but was not invited to a hearing in front of the school board until an hour and a half prior to the scheduled meeting. Mr. Balachandra did not attend the hearing and objected to the inadequate notice. The Board of Reference held that the school board had violated the principles of natural justice in that the teacher had not been given an adequate opportunity to be heard. The appeal was allowed and Mr. Balachandra reinstated.

A British Columbia case[19] did not involve termination of contract but did involve procedural matters that are significant. Two female teachers were "summoned" to attend a school board meeting to explain their involvement in problems in the school where they both taught. The teachers did not attend the meeting as requested and were subsequently suspended without salary for disobeying a lawful order of the board. The teachers were invited to attend another school board meeting for an interview in regard to suspension provided for by statute. These teachers, accompanied by a lawyer, attended the meeting but refused to answer questions or give information. Consequently, the teachers were further suspended.

The teachers, with the backing of the British Columbia Teachers' Federation, applied for judicial review of the situation. Mr. Justice Fulton, in his reasons for judgment, held that the orders "summoning" teachers to the meetings were unlawful as being beyond the powers of a school board as outlined in The Public Schools Act.[20] Justice Fulton further stated that the orders were a denial of natural justice.

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[17] Penner v. Board of Trustees of the Edmonton Pub. School Dist., unreported (Can. 1973). *See also* note 14, *infra*.

[18] Balachandra v. School Comm. of Cty. of Barrhead, unreported (Can. 977).

[19] Johnston and Ferry v. Board of School Trustees, School Dist. 35, unreported (Can. 1979).

While addressing the question of school board power to require attendance of the teachers to a meeting, Mr. Justice Fulton held that the express power in The Public Schools Act[21] occurs only after a teacher has been suspended. In any case, according to that Act, it is the teacher not the board who decides whether there will be an interview. Mr. Justice Fulton went on to say that "the Board's function is to supervise generally the educational process within its jurisdiction. Its function is not to run the schools and discipline teachers on a day to day basis." The court concluded that since the school board was without power to summon the teachers, there was no lawful order that could be disobeyed and that the suspensions were unlawful.

Turning to the question of a denial of natural justice, Mr. Justice Fulton, said that:

> As to denial of natural justice, I take it to be common ground that a school board, although it has many administrative functions, is, in deciding whether a teacher should be suspended or dismissed, not acting as a purely administrative tribunal but is exercising a judicial or quasi-judicial function and is bound to act in a judicial manner, which includes acting in accordance with the principles of natural justice.
> In my opinion the Board was so bound, but did not so act.[22]

Mr. Justice Fulton commented further on a denial of natural justice and noted that the failure and refusal of the school board to give any particulars of the problem or of the teacher involvement constituted a "total denial of natural justice." He further noted that under such circumstances, it was contrary to natural justice to demand that the teachers answer any questions or give any evidence when the particulars had been refused.

The court held that the suspensions be set aside and that lost salary be paid.

UNUSUAL CASES

The following case is significant in that it was the first reported teacher termination case in Alberta. In fact, the termination took place before Alberta became a province and was heard after Alberta joined the confederation. In the *Clipsham* case,[23] Mr. Clipsham was terminated on January 3, 1905 for alleged immoral conduct. Apparently, the allegation of immoral conduct was not proven and the alleged immorality was not described in the report. The teacher claimed that since he was under contract for the full year at a salary of $600, he was entitled to salary for the remainder of the year. Following an appeal to the Commissioner for the North-West Territories and two appeals to the courts, Mr. Clipsham was finally awarded $75.15 by the Full Court of the North-West Provinces in Regina on April 30, 1907.

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[20] Public Schools Act, REV. STAT. B.C. (1978) c.319.

[21] *Id.*

[22] *Id.*, *supra* note 19 at 12.

[23] Clipsham v. Grande Prairie School Dist., 6 W.L.R. 95 (N.W.T.C.A. 1907).

The *Ashlie* case[24] also involved immoral conduct. This case, although it happened in the United States, serves as an example of another unusual case in that the reason for termination is unique and is an example of a landmark case that could affect future cases. This case also involves a denial of natural justice. Ms. Ashlie, who had undergone a sex change while teaching in Pulaski Middle School in Media, Pennsylvania was terminated on the grounds of immorality. Three weeks following the sex change Ms. Ashlie was fired. Ms. Ashlie appealed the termination and it was heard by Mr. Justice Van Artsdalem of the United States district court. The court did not deal with the matter of alleged immoral conduct but rather found that Ms. Ashlie had not been granted a hearing before the school board terminated her contract. Ms. Ashlie was awarded full back pay and reinstated.

Another unusual case involving an appeal of a resignation by a school board is *Watson.*[25] On January 12, Mr. and Mrs. Watson wrote the school board retroactively resigning from their contracts of employment effective the end of the Christmas holiday. Mr. and Mrs. Watson were under contract to continue their teaching duties following the Christmas vacation but never did so. The school board appealed the resignation to the Board of Reference, who ordered the Watsons to each make a payment of $250 to the Northern School Board as reimbursement for expenses incurred by the school board in advertising positions they vacated and the cost of transporting replacement teachers. The Watsons made an application by way of certiorari to the Court of Queen's Bench to quash the decision by the Board of Reference. The Court of Queen's Bench dismissed the application.

A study by Swan on the Board of Reference in Alberta referred to some unusual reasons for terminating teachers' contracts. Swan[26] identified the following reasons for terminating teachers' contracts in Alberta:

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[24] Ashlie v. Chester-Upland School Bd., unreported (D. Pa. [U.S.A.] 1979).

[25] Watson v. Northern School Bd., unreported, *cert. denied* (Can. Ct. Q.B. n.d.).

[26] J. SWAN, A HISTORICAL SURVEY OF THE BOARD OF REFERENCE IN ALBERTA (1961) at 108.

lack of cooperation with other teachers • difficulties in money matters • participation in school board elections • ill health • lack of cooperation with school board • engagement in other occupation (farming) • unsuitability for grade level • use of sarcasm • attitude towards Christmas concert • racial discrimination • unauthorized use of religious pamphlets • desire of school board to establish retirement age for female teachers • desire of school board to replace male by female teacher • desire of school board to replace female by male principal • desire of school board to replace nonbilingual by bilingual teacher

It was also noted by Swan that the above reasons were not specified in statute and that teachers won all but three of the eighteen listed above. Of the three cases lost, one was related to unsuitability for grade level, one to participation in school board elections and one to engagement in farming.

PRESENT CIRCUMSTANCES

Reasons for termination of teacher contracts are stated in some statutes. If reasons are not enumerated, school boards are still required to state reasons for termination. When reasons are stated in statute, school boards are required to adhere to the statutory reasons.

Most provinces have a probationary period for teachers ranging from one to three years with two years being the most common. In British Columbia, the teacher's initial appointment is continuous but he may be put on probation during his first nine months of employment. Quebec teachers are employed on one year renewable contracts and do have access to appeal procedures if their contract is terminated or if they are not re-engaged for the next school year. The probationary period is noted because a probationary teacher does not have tenure and in most instances does not have access to appeal procedures if the school board does not wish to retain the teacher on staff.

The length of notice for termination varies considerably. The range is from no notice to three months with thirty days being the most common.

Most provinces have a three-person appeal body. The exceptions are Alberta, New Brunswick, Nova Scotia and the Yukon which have a one-person board of appeal. The right of appeal is automatic in all provinces, however, in Ontario the Minister of Education may refuse to grant a hearing by the Board of Reference. There is no appeal to the Minister's decision.

In most provinces and territories, termination and appeal procedures are contained in a school act. However, there are exceptions. In Newfoundland, all procedures are contained in the collective agreement and are, therefore, negotiable. New Brunswick, Quebec and the Northwest Territories have some procedures in a school act and these procedures are either elaborated or modified by clauses in collective agreements.

Most statutes state that the decision of the appeal body is final and binding on the parties. British Columbia, Saskatchewan, Manitoba, and New Brunswick are the exceptions in that the statutes state an appeal may be made to a higher court. Even though the statutes state there is no appeal, an appeal is still possible by way of judicial review.

Four provinces, Alberta, Manitoba, New Brunswick and Ontario, do not specify reasons for termination in statute. Statutory reasons for the other provinces and territories vary from one statute to another and a number of statutory reasons are ambiguous. For example, the term "cause" or "just cause" is often stated as a statutory reason and is used when a teacher's conduct does not fall within a specified termination area. Because the phrase is open-ended, it could be cited as the only reason for terminating a teacher's contract, however, the general practice is to specify and elaborate upon the cause for termination.

The terms "unprofessional conduct," "misconduct" and "immorality" are sometimes used interchangeably and are equally ambiguous. "Unprofessional conduct" is used in only one statute. Determination as to the constitution of unprofessional conduct is generally left to the professional organization and other reasons are usually used for termination of teachers' contracts. Composition of "misconduct" and "immorality" varies from one place to another so what may be considered "misconduct" or "immoral" in one area, may be condoned in another. "Gross misconduct" is a matter of degree and the difference between misconduct and gross misconduct depends upon the judge.

The terms "incompetence" and "unsatisfactory service" are also quite vague when they stand alone. These reasons, similar to the ones mentioned previously must be further elaborated on if they are to mean anything.

Insubordination, neglect of duty, disability and refusal or neglect to obey a lawful order of the board are reasons frequently employed when describing the manner in which teachers discharge their responsibilities. These four terms reflect various aspects of a common problem. "Insubordination" is the failure of a teacher to abide by reasonable requests made by the administration of the school or school board. The term "neglect of duty" is failure to carry out duties, both written and implied, in a competent manner. The term "disability" could mean either mental or physical inability to carry out duties required of a teacher. "Refusal or neglect to obey a lawful order of the board" is generally the result of a specific order of the board directed toward an individual teacher as a means of ordering the teacher to do something specific or to cease a course of action.

Termination, as a result of a "criminal conviction," is generally predicated on a notice of conviction. The school board must decide if the conviction resulted from a serious offense that would harm his position as a teacher.

In a number of cases, school boards have used "redundancy" or "elimination of position" as a means of removing an undesirable teacher. However, there have been other cases where a declining enrollment has necessitated a reduction in courses or grades offered in a school and the termination of one or more positions was necessary.

The reasons for termination of teacher contracts are numerous and often ambiguous. These reasons can be grouped and classified under a few broad categories. For the purpose of this chapter these categories have been classified as: misconduct; incompetence; neglect of duty; criminal conviction; and redundancy.

A school board's decision to terminate a tenured teacher's contract may be appealed to a tribunal (usually called a Board of Reference). Cases may be appealed on the basis of: the merits of the case; a denial of the rules of natural justice; noncompliance with statutory provisions; inadequate notice; or other reasons peculiar to the case.

The tribunal's decision may only be appealed if there is provision in some statute for an appeal. Only four out of twelve Canadian tribunals provide for an appeal to their decision.

If an appeal to a tribunal's decision is prohibited, their decision may be challenged by way of judicial review. Grounds for judicial review would include: failure to comply with statutory provisions; failure to abide by the rules of natural justice; an error at law on the face of the record; abuse of power; bad faith; failure of a public official to perform a duty; and other grounds peculiar to the case.

One question frequently addressed by tribunals and courts is whether the school board, in terminating a teacher's contract, acted as an administrative or judicial or quasi-judicial body. As a result of examining cases on this point, the majority opinion appears to be that school boards serve a judicial or quasi-judicial function when deciding to terminate a teacher's contract. Therefore, it follows that school boards must adhere to the rules of natural justice when terminating teachers' contracts.

Cases that are appealed on procedural grounds may alter procedures used in subsequent cases if they are successful. If a case is unsuccessful, then the procedure is likely to carry on as before. A case that was appealed on the grounds that the school board refused to carry out the tribunal's orders illustrates there is no formal procedure to require a school board to implement the tribunal's decision. Other cases appealed on procedural grounds have resulted in decisions that enable school boards to delegate authority to a committee to deal with terminating a teacher's contract; require school boards to give teachers adequate notice for a hearing; require school boards to abide by the rules of natural justice; and prohibit school boards from "summoning" teachers to a school board meeting without providing reasons.

IMPLICATIONS FOR TENURE

It has been shown by examining a number of cases that school boards are required to follow termination procedures established in statute or agreed upon in some other way. Following established procedures when terminating a teacher's contract is one aspect of tenure that has been well established in Canada. However, the probationary period practiced in all provinces and territories, except British Columbia, militates against tenure. A probationary period necessitates a temporary contract of employment for the probationary period and if a board does not want to retain the teacher then reasons are not necessary and the contract terminates on its termination date. If the probationary period was eliminated, it would be necessary for boards and teachers to enter into continuing contracts in the first year of employment. If this were done, it would have implications as far as hiring practices are concerned. It would also make new teachers more secure in their positions. It may even have implications for teacher training institutions in as much as they may begin screening students into the faculty and may be concerned with the quality of their graduates.

Similarly, although the rules of natural justice are followed when terminating teachers' contracts in most parts of Canada, some instances were identified where the rules were not followed. One rule of natural justice is that reasons for termination of contract must be provided. The rules of natural justice have implications for termination of teachers' contracts in Manitoba where school boards are not required to give reasons for termination unless teachers request reasons, then they are required to accede to the request. There is also a problem with regard to ambiguity of the reasons provided.

Once a teacher is satisfied that reasons have been supplied and the reasons are relatively free from misunderstanding, natural justice requires that the teacher receive a fair hearing. This requirement has implications for Manitoba and Ontario. Manitoba teachers are not given a hearing unless reasons for termination are related to incompetency or character of the teacher. Ontario teachers are not given a hearing by the school board and may be refused a hearing by the Board of Reference if the Minister refuses to order a hearing.

Do Canadian teachers have security of tenure? Generally speaking, Canadian teachers are protected from indiscriminate termination by employers and do have security of tenure; the amount of tenure cannot be measured. There is no such thing as absolute tenure; rather tenure is a matter of degree.

CONCLUSIONS FROM LANDMARK CASES

Procedures established as a result of landmark cases have important implications for subsequent termination procedures. Landmark cases identified in this study established the following procedures in the provinces in which the case was heard and may have an influence in other provinces:

1. School boards are required to follow the rules of natural justice.
2. A hearing by the superintendent does not comply with the rules of natural justice.
3. There is no requirement that hearings be held in public.
4. Teachers must be given adequate notice prior to a hearing.
5. School boards cannot accumulate a number of misdemeanors over a long period of time and use them as reasons for termination.
6. School boards can require the curriculum to be taught in a particular language.
7. Reasons for termination that have a denominational value are upheld by courts.
8. School boards are required to follow statutory requirements when terminating a teacher's contract.
9. Teachers must be advised that they are not performing up to expectations prior to being terminated.

Establishment of the procedures have implications for school boards and administrators when terminating teachers' contracts.

IMPLICATIONS FOR SCHOOL ADMINISTRATORS

School superintendents, as executive officers of school boards, are required to identify teachers whose contracts may be terminated. Subsequently, superintendents must prepare the preliminary case against the teacher in question. Superintendents, while preparing such a case, should follow the rules of natural justice; follow statutory provisions; provide teachers with fair and unbiased evaluations; formulate well founded reasons based on fact; act reasonably; act in good faith; and obtain counsel.

The judicial system decides upon the admissibility of reasons for termination as well as whether or not the teacher has been treated fairly and reasonably. Circumstances of each case are different, therefore, each case has to be considered on its own merits.

However, what reasons can administrators expect to have accepted by an appeal body? Utilizing the six major reasons identified in this study some comment would be appropriate.

Incompetence

The inherent difficulty in asserting incompetence lies in establishing some objective standard of performance. Appeal boards consider all mitigating factors that may explain alleged incompetence such as proper placement in accordance with training and experience. If a teacher's job is in jeopardy, it is necessary to provide adequate warning and opportunity to correct existing deficiencies.

Elimination of Position

When utilizing "elimination of position" as a reason for termination, administrators should establish criteria to determine who should be eliminated. Criteria could include reverse seniority (last in—first out), subject, or program area, and grade level. In all cases, effort should be made to relocate teachers in positions where they may be able to function more adequately.

Misconduct

The employer must show more than mere dissatisfaction with the teacher's performance. Real misconduct must be demonstrated and unless it was of a very serious nature, on more than one occasion. There is no fixed rule defining the degree of misconduct.

Neglect of Duty

The exact nature of the neglect of duty would have to be specified in the reasons for termination. Generally, an isolated neglect of duty would not in itself be sufficient cause to warrant termination. Wilfull neglect of duty is generally regarded as justifiable cause for termination. Refusal of a teacher to carry out lawful and reasonable orders will generally be cause of termination. The refusal, however, must be intentional and deliberate.

Insubordination

A single act of insubordination will not generally be sufficient to warrant termination. Provocation may be pleaded as a defense to the allegation of insolence. Personality clashes that result in insubordination are not grounds for termination.

Criminal Conviction

When a teacher is charged with a criminal offense the school administration has to decide if the teacher's presence will be detrimental to the well being of students in the classroom. That decision will depend upon the nature of the offense. If the administration decides that the teacher should not be in the classroom, then the teacher is suspended pending the outcome of the trial. When a teacher is convicted of a criminal offense administrators have to decide whether or not to proceed with termination. That decision will depend upon the nature of the offense with due regard to the effect of the teacher's presence in the classroom.

At the present time, the elimination of "undesirable" teachers from the classroom lies with school administrators. Consequently, the onus to have their cases well prepared rests with administrators.

CONCLUSIONS AND RECOMMENDATIONS

In concluding this chapter of the procedures and reasons for termination of teacher contracts in Canada, several observations should be made.

It has been observed that procedures for termination vary from one province or territory to another and, although there are similarities, there are also distinct differences. Likewise, the reasons for termination are numerous and in some instances ambiguous. The differences in procedures and the various reasons employed result in a great deal of confusion when dealing with the termination of teachers' contracts. The major reason for variances in procedures and reasons appears to rest in the Constitution,[27] which enabled provinces to establish their own educational systems.

Most commonly stated reasons for termination contained in statutes are: incompetence, misconduct, neglect of duty, and refusal or neglect to obey a lawful order of the board. Whereas the major reasons stated in cases were incompetence and elimination of teacher's position, minor reasons stated in cases were misconduct, neglect of duty, insubordination and criminal conviction. Incompetence not only appeared in statutes as a reason for termination; but also, constituted the major reason (almost 34 percent of the cases) for termination of teachers' contracts.

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[27] *See* note 1, *supra*.

The second major reason for termination of teacher contracts was elimination of position. Even though that reason appeared in only one statute (Nova Scotia) it was utilized in thirty-two percent of the cases cited in this study. It appeared as if school boards have been relatively successful in the use of "elimination of position" as a reason for terminating teachers' contracts. As this reason has been relatively unsuccessful in civil cases, it is difficult to understand why it has been successful in education. Could it be that boards continued to use the same reason even though the real reason may have been different?

It is apparent that, in Canada, there is a great deal of diversity in procedures and reasons for terminating of teacher contracts. Such diversity as fostered by the provisions of the Constitution.[28] While there is some virtue in uniformity for its own sake, there is merit in having similarity in legal provisions and reasons for termination of teacher contracts across Canada. A teacher who moves from one province or territory to another is not only faced with different procedures but also that teacher is confronted with different reasons. In the interest of mobility and consistency, it would seem desirable to have the same legal protection in one part of the country as in another. With present communication channels between provinces and territories, such as the Council of Ministers, there is no reason for procedures to be as diversified as they are at present. It is therefore recommended that a Canadian model for termination of teacher contracts be developed. Such a model should include the following provisions: (1) rigid adherence to the rules of natural justice; (2) three levels of appeal, school board, appeal board and the courts; (3) appeal to the courts should be on the basis of matters of law and not of fact; (4) rigid time constraints; and (5) a three person appeal board comprised of a judge as chairman and two educators as members.

RATIONALE

Adherence to the rules of natural justice is in keeping with a sense of fairness. To quote an old cliche "not only should justice be done but it should be seen to be done."

A first line of appeal to the school board is in keeping with the rules of natural justice. Appeal to an appeal board should be granted as a right with no provision for a denial of that right. An appeal to the courts should be based solely on errors of law in order to reduce the accessibility of the courts to termination matters.

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[28] *Id.*

Time constraints should be short and rigid in order to have the case proceed as quickly as possible. No one benefits from cases that are drawn out over long periods of time.

With a judge and two educators on the appeal board, decisions should be legally and educationally sound. Hopefully, high quality remedies which are socially responsible as well as educationally beneficial would result.

Because of the prevalence, complexity and apparent inability of non-educators to deal with incompetence it is further recommended that: termination for alleged incompetence be handled by means of a separate and independent process than termination for other reasons.

The process should include the following features: adherence to the rules of natural justice; several evaluations by more than one person over a period of time; at least one evaluator from outside the school system; . panel of educators to rule on the alleged incompetence; and appeal to the courts on matters of noncompliance with proper procedures.

When an evaluation is written about a teacher, the teacher should have the opportunity to rebut information contained in the evaluation. Application of the rules of natural justice would allow teachers to state their reactions to an evaluation report.

In order to assure validity and reliability, evaluations should be made by more than one person on more than one occasion. To eliminate the possibility of bias an external evaluator should be utilized.

A panel comprised entirely of peers would be in a good position to assess the alleged incompetence. The decision of the panel of peers should be final and binding with the exception of an appeal to the courts on the basis of noncompliance to procedures.

Because of the possible misuse of "elimination of position" as a reason for termination of teacher contracts it is recommended that: "elimination of position be carefully monitored as a reason for termination of teacher contracts."

Monitoring "elimination of position" as a reason for termination an appeal board should determine: (1) why the position was eliminated —was it because of economic uncertainty, declining enrollment, staff reduction or school closure; (2) how the teacher was selected as the one to be terminated, had the school board established criteria to determine who should be eliminated; (3) whether the school board endeavored to find another position within the system for the teacher;

(4) if the school board hired other teachers with similar qualifications to the one being terminated; and (5) if it was really necessary to terminate the teacher's contract.

SPECULATION ABOUT FUTURE TRENDS

Since North America is presently the most litigation prone society in the world, it is reasonable to expect that the frequency of teacher termination cases will increase significantly during the next decade.

In the past, futurists could make relatively accurate predictions in Canada by observing trends in the United States. However, it is no longer accurate to assume that trends and attitudes in Canada lag behind their southern counterparts. In both Canada and the United States, many factors will contribute to an increase in termination of teacher contracts for alleged incompetence and teacher malpractice. Such factors may include teacher surplus, declining enrollment, vocalized public awareness, economic unrest, and a movement toward quality education. Similarly, the human rights movement must also be considered. Teachers, perhaps more than any other professional group will realize that they are entitled to basic human rights and freedoms. This realization will probably result in more termination appeals involving human rights.

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Home Instruction in Lieu of Compulsory Attendance: Statutory and Constitutional Issues

ERIC S. MONDSCHEIN AND GAIL PAULUS SORENSON

Eric S. Mondschein is Director of the Law, Youth and Citizenship Program, co-sponsored by the New York State Bar Association and the New York State Education Department. He has served in several capacities with the U.S. Department of Education. He holds M.Ed. and Ed.D. degrees from the University of Massachusetts. Dr. Mondschein has been actively engaged in writing and has had several articles published on school law topics. He has also presented papers for educational organizations and numerous workshops on teacher and student rights in secondary and higher education.

Gail Paulus Sorenson is Assistant Professor, Department of Educational Administration and Policy Studies, State University of New York at Albany. She received her Ed.D. degree from the University of Massachusetts in Division of Educational Policy, Research Administration. Dr. Sorenson also received her J.D. degree from Western New England College School of Law. She is qualified as a teacher and professor and has written proficiently and knowledgeably on the many facets of school law.

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.—*Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925)
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> If the family itself is not beyond regulation in the public interest .... Acting to guard the general interest in youth's well being, the state as *parens patrie* may restrict the parent's control by requiring school attendance, regulating or prohibiting child labor, and in many other ways.—*Prince v. Massachusetts,* 321 U.S. 158, 166 (1944)

INTRODUCTION

In recent years an increasing number of parents have been seeking alternatives to public education. Many are electing to send their children to private or parochial schools, and a small but growing number of parents are deciding to educate their children at home. This chapter will explore the issues involved in home education as they relate to state compulsory school attendance laws. The first section will examine the purpose and context of compulsory attendance; section two will highlight the public or private school alternative; section three will explore the statutory and case law providing for home education; and section four will raise some of the constitutional issues and concerns related to home education. The chapter will conclude with suggested guidelines for school districts to consider when presented with a home education request.

COMPULSORY SCHOOL ATTENDANCE

The first state law requiring students to attend school was enacted in Massachusetts in 1850. By 1918, school attendance laws had been passed in all states. However, after the United States Supreme Court's landmark decision in *Brown v. Board of Education*,[1] several southern states rescinded their compulsory attendance laws. Today, every state, with the exception of Mississippi has an effective compulsory school attendance law.[2] These laws require parents or guardians to send their children, generally between the ages of seven and sixteen, to school for a certain period of time and for a specified number of days per year.[3] Failure to do so could result in fines and/or imprisonment.[4] Attendance laws are premised, in general, on the idea that education promotes the general welfare of the people and are a proper exercise of a state's police power.[5]

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[1] 347 U.S. 483 (1954).

[2] In 1981, Mississippi enacted a new compulsory attendance law; however, no provision for enforcement or sanction is included.

[3] Most state statutes compel attendance at either public or private schools. For an in-depth analysis of all state statutes regarding compulsory education laws, *see* L. KOTIN & W. ALKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980).

[4] *See, In re* Franz, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977); *In re* H., 357 N.Y.S.2d 384 (N.Y. Fam. Ct. 1974). Failure to cause a child to attend school is deemed a criminal offense. New Hampshire and Colorado treat such offenses as civil. For a detailed analysis *see* L. KOTIN & W. ALKMAN, *supra* note 3.

[5] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Marsh v. Earle, 24 F. Supp. 385 (D. Pa. 1938). *See also In re* Shinn, 16 Cal. Rptr. 165, 168 (Cal. Dist. Ct. App. 1961). ("A primary purpose of the educational system is to train school children in good citizenship, patriotism and loyalty to the state and nation as a means of protecting the public welfare.") *Compare* People v. Turner, 98 N.Y.S.2d 886, 888 (N.Y. App. Div. 1950). ("The object of the compulsory education law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for society.")

The importance of education to the state is demonstrated by the fact that forty-eight states have constitutional provisions requiring their legislature to establish a public school system.[6] The constitutional provision of Minnesota is typical: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools."[7]

THE PUBLIC OR PRIVATE SCHOOL ALTERNATIVE

In the late nineteenth and early twentieth centuries, many legislatures required that children attend public schools in order to comply with the attendance laws, thereby prohibiting the alternative of private school education. In *Pierce v. Society of Sisters*,[8] the United States Supreme Court struck down the public school attendance requirement. The court found that to require children to attend public schools, and not to permit the private school alternative,

> interfers with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only . . . .[9]

Today, state compulsory education laws either explicitly or implicitly allow the attendance requirement to be satisfied by sending children to private schools. A typical compulsory attendance statute states: "Every child between the minimum and maximum ages established for school attendance by the board of education . . . shall . . . attend a public day school . . . or some other day school approved by the school committee . . . ."[10]

In most states, private schools must be "approved" by the state. This approval must be given by either the State Department of Education or the local school board in the district where the private school exists. Without such approval, students enrolled in private schools would be violating the compulsory attendance laws. Approval usually consists of the state determining that the private school is: (1) physically safe; (2) providing an equivalent curriculum and instruction; (3) complying with the length and duration of school days and school year; and, in some states, (4) providing instruction by certified or qualified personnel.[11]

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[6] The constitutional provisions of Alabama and Mississippi stipulate that the legislature may elect to establish public schools. In all other states the constitutional provisions *require* the establishment of public educational systems. *See also* Brown v. Board of Educ., 347 U.S. 483, 495 (1954). "Today, education is perhaps the most important function of state and local governments."

[7] MINN. CONST. art. VIII, § 1.

[8] 268 U.S. 510 (1925).

[9] *Id.* at 535.

[10] MASS. GEN. LAWS ANN. ch. 76, § 1 (current).

Although parents have the choice of sending their children to public or private schools in order to comply with state compulsory attendance laws, a small but growing number of people do not believe that the public or private school alternative is adequate to meet their needs. These people are electing to educate their children at home in lieu of the public or private school option.

HOME EDUCATION: A STATUTORY EXEMPTION

The right to educate a child at home has been granted in a majority of states.[12] Ten states explicitly permit "home instruction" in their compulsory school attendance statutes.[13] Private instruction or tutoring is explicitly provided for in the statutes of ten other states,[14] and the case law in six more states allows for home education.[15] The states where statutes explicitly provide for home education or instruction, have witnessed little or no litigation on the issue. In states which do not expressly permit instruction in the home, state courts have been involved in determining whether home education would be permissible under the compulsory attendance statutes.

Massachusetts, as noted above, enacted the first compulsory school attendance law. It was also the first state to have its statute challenged. In *Commonwealth v. Roberts*,[16] the court interpreted the compulsory school attendance law as implicitly permitting home education. The Massachusetts statute stated "Every child . . . shall attend a public day school . . . or some other day school . . . but such attendance shall not be required of a child . . . who is being otherwise instructed . . . ."[17]

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[11] *See* Guidelines for Approval of Private Schools, Mass. Dept. of Educ. memo. *Compare* Mass. Gen. Laws ch. 76 § 1 with Tenn. Code Ann. § 49 5201-5204 (1970). The regulation of private schools is an ongoing issue. For an interesting examination of the issues *see* Arons, *The Separation of School and State: Pierce. Reconsidered*, 46 Harv. Ed. Rev. 76 (1976).

[12] Home education or instruction will be examined only as it relates to children who could otherwise attend school. Exceptions from school attendance because of disability or lack of transportation, etc., will not be explored.

[13] Arizona, Colorado, Florida, Missouri, Nevada, Ohio, Oregon, Utah, Virginia, and West Virginia.

[14] Alabama, Alaska, California, Connecticut, District of Columbia, Hawaii, Iowa, Pennsylvania, Rhode Island, and South Dakota.

[15] Indiana, Illinois, Massachusetts, New Jersey, New York and Oklahoma.

[16] 159 Mass. 372, 34 N.E. 402 (1893).

[17] Mass. Gen. Laws Ann. ch. 76, § 1 (current).

The Supreme Judicial Court interpreted the "otherwise instructed" exception so as to permit home education. In its opinion, which has been quoted in numerous cases, the court declared, "the great object of [compulsory attendance] provisions . . . has been that all children be educated, not that they be educated in any particular way."[18] The court indicated that the instruction could be provided by a private tutor, a governess, or by the parents, and added the stipulation that it be given "in good faith" and be "sufficient in extent."[19]

In *People v. Levison,*[20] the Illinois high court found that although state statutes provided only for public or private school attendance, education in the home could be defined as a private school.[21] The court held that when a young child received regular instruction for five hours a day from a parent who had two years of college and some training in psychology, and when the child demonstrated an ability comparable to other third graders, the child was, in effect, attending a private school within the meaning of the statutes. In rendering its decision the court pointed out that "the law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools."[22]

In *State v. Hoyt,*[23] however, the New Hampshire Court refused to consider home education as a substitute for instruction in a private school. The court held that it would be unreasonable to require the states to supervise and/or regulate education provided in the home. The administrators' inconvenience outweighed parental desires to educate their children at home.

A New York appellate court in *People v. Turner,*[24] reversed the conviction of parents found guilty of violating the state's compuslory attendance statute. The court found that when parents are adequately educating their children at home and their program is not meant to evade the compulsory education statute, the requirements of the statute are satisfied.[25] The court based its decision on those sections of the attendance statute which allow for education "at a public school or elsewhere" provided that the education is "substantially equivalent" to the instruction given to children of like age in the public schools and is given by a competent teacher.[26] Because the statutes did not define "competent teacher," the court refused to accept the prosecutor's contention that the teacher must be certified.[27]

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[18] *Roberts,* 159 Mass. at 374.

[19] *Id.*

[20] 90 N.E.2d 213 (Ill. 1950).

[21] Courts in Kansas and Washington have been unwilling to consider home education as a private school. *See, e.g.*, State v. Garber, 419 P.2d 896 (Kan. 1966), *cert. denied*, 389 U.S. 51 (1967); State v. Lowery, 383 P.2d 962 (Kan. 1963); Shoreline School Dist. 412 v. Superior Court, 364 P.2d 999 (Wash. 1959), *cert. denied*, 363 U.S. 814 (1960); State v. Counort, 124 P. 910 (Wash. 1912). *Compare* State v. Peterson, 70 N.E. 550 (Ind. 1904); Wright v. State, 209 P. 179 (Okla. 1922). *See generally, Private Tutoring, Compulsory Education and the Illinois Supreme Court*, 18 CHI. L. REV. 105 (1950).

[22] *Levison*, 90 N.E.2d at 215.

[23] 146 A. 170 (1929). This decision effectively prohibits home education in New Hampshire. In a 1974 decision, *In re* Davis, 318 A.2d 151 (N.H. 1974) the State Supreme Court referred to Hoyt with approval.

[24] 98 N.Y.S.2d 886 (1950).

One of the leading cases concerning home education is *State v. Massa.*[28] The New Jersey high court overturned its longstanding position that home education, by its very nature, could not be substantially equivalent to the education received in a public or private school.[29] The court in finding for the parent, indicated that it was the legislature's intent to provide for the alternative of home instruction. The New Jersey education statute requires children to attend public schools "or to receive equivalent instruction elsewhere than at school."[30] In its previous decisions the court held that in order for children "to develop socially it would be necessary for them to be educated in a group."[31] In *Massa*, the court recognized that this "group" of children constituted a *de facto* school, and directly contradicted the statute's provision that education could take place "elsewhere than at school." The court held that equivalent education, as determined by statute, concerns only the academic equivalency of the education provided. "[T]o hold that the statute required equivalent social contact and development . . . would emasculate this alternative and allow only group education, thereby eliminating . . . home education."[32] The court also held that the statute did not require the home educator to be a certified teacher, and the court would not substitute its judgment for that of the legislature.[33]

A Massachusetts court, in *Perchemlides v. Frizzle,*[34] held that parents have a right to educate their children at home. The court declared, however, that this right is not absolute, and that it is subject to reasonable regulation by the state through local public school officials. The court made it clear that this state control, "must be framed so as to allow home education to remain a feasible alternative for parents who are educated and who can provide instruction in the subjects that are taught in the public schools."[35] The court also indicated that a child taught at home should receive the same number of hours of instruction as a public school student, and that school authorities must be satisfied that the "parents are competent to teach and that they are doing so diligently, consistently, and in good faith."[36] School authorities were also instructed that they could periodically test the home educated child to ensure that minimum standards were being maintained.[37] By employing the "substantially equivalent" concept, the court followed the reasoning in *State v. Massa*,[38] finding that the education must be academically but not socially equivalent. "To impose a requirement of equivalency in social contacts would make home education impossible in almost every case."[39]

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[25] *Id.* at 888.

[26] N.Y. EDUC. LAW § 3204(1),(2) (McKinney 1970).

[27] *Turner*, 98 N.Y.S.2d at 888. *See also In re* Foster, 330 N.Y.S.2d 8 (1972).

[28] 231 A.2d 252 (N.J. 1967).

[29] *See* Knox v. O'Brian, 72 A.2d 389 (N.J. 1950) and Stephans v. Bonghart, 189 A. 131 (N.J. 1937).

[30] N.J. STAT. ANN. tit. 18 § 14 (West 1966).

[31] *Massa*, 231 A.2d at 255.

[32] *Id.* at 257.

[33] In Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980), the court upheld the right of a state to require that teachers be certified when providing home instruction.

[34] *Perchemlides*, slip op. Civil No. 16641 (Mass. Hampshire Super. Ct. Nov. 13, 1978). Although this case was decided by a county court, it is one of the most well-reasoned opinions on the statutory and constitutional issues concerning home education. It should also be noted that the Mass. Dept. of Educ. uses the guidelines developed by the court regarding home education. *See* Advisory Opinion on Home Education, Memorandum to School Committee Chairpersons, Mass. Dept. of Educ. (Jan 4, 1980).

An interesting aspect of the *Perchemlides* decision is the court's holding that the parents were entitled to some minimal procedural safeguards when presenting their home education plan.[40] Although the court did not require the procedures to be in writing, all parties must know the criteria to be used in evaluating the plan, and a decision not to accept the parents' plan must be provided in writing with an explanation for the denial.[41]

The *Perchemlides* decision also raised the issue as to whether or not home education is a constitutionally protected right. The court indicated that when home education is permitted by statute, it derives the same degree of constitutional protection as do other statutory alternatives, such as those providing for education in public schools.[42] The court also suggested that if the compulsory attendance statute did not exempt students taught at home, the statute might be unconstitutional.[43]

Although the *Perchemlides* decision was based on statutory considerations, it did raise interesting constitutional questions. The next section will highlight the constitutional issues involved in home education.

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[35] *Id.*, slip op. at 12.
[36] *Id.*
[37] *Id.*
[38] 231 A.2d 252 (N.J. 1967).
[39] *Perchemlides*, slip op. at 13, *citing* State v. Massa, 231 A.2d 252 (N.J. 1967).
[40] *Id.*, slip op. at 27-7.
[41] *Id.*
[42] *Id.*, slip op. at 10.
[43] *Id.*, slip op. at 9.

HOME EDUCATION: THE CONSTITUTIONAL ISSUES

Where there is no express or implied provision for home education in state education statutes, the question arises as to whether or not parents may nevertheless have a constitutional right to educate their children at home.[44] The constitutional basis of such a right is thought to derive from one or more of the following: basic common law principles, early Supreme Court cases related to education, and/or cases related to the right of privacy.[45]

Turning first to Blackstone, who summarized English common law in 1765, we find that the discussion revolves primarily around the concept of duty rather than right. Parents owed certain duties to their legitimate children, principally maintenance, protection, and education. These duties were owed "by virtue of the begetting."[46] In turn, the power of a parent over his child is derived from the duty owed.

Blackstone also clarified the position of law in regard to the parent-child relationship saying that law enforces the parental duty "though providence has done it more effectually than any laws by implanting in the breast of every parent that natural, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally supress or extinguish."[47] When speaking of the duty to educate, however, Blackstone indicated that the municipal laws of most countries "seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children."[48] If Blackstone's commentary gives little support to the idea of a parental right to educate the child, it remains to examine the leading Supreme Court cases from which it might be said that such a right derives.

Two major Supreme Court cases from the 1920's contain *dicta* which provide at least general support for the right of parents to control the upbringing and education of their children.[49] In *Meyer v. Nebraska*, the leading case on this issue, the Court said that the liberty guaranteed by the fourteenth amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children. . . ."[50] In *Pierce v. Society of Sisters*, the Court said that a state statute requiring education in public schools was an unreasonable infringement on "the liberty of parents and guardians to direct the upbringing and education of children under their control."[51] Rejecting complete state authority over the child, the Court added that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[52] Taken together, these cases can be said to affirm only a non-absolute and non-exclusive right of parents to be involved in the education of their children.

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[44] The case law which relates most closely to the issue of a general parental right to educate children at home does not answer this question. *See* Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980) (no fundamental right to home instruction by a non-certified instructor); Scoma v. Board of Educ., 391 F. Supp. 452 (N.D. Ill. 1974) (compulsory attendance law abridges no fundamental right).

[45] *See, e.g.*, T. van GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM (1976); *Home Education in America: Parental Rights Reasserted*, 49 U.M.K.C. LAW REV. 191 (1981); Aarons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76 (1976).

[46] 2 W. BLACKSTONE, COMMENTARIES 446, 451 (1969 reprinted from 1771 version).

[47] *Id.*

[48] *Id.* at 450-51 (1969).

[49] Although parents were not actual parties in these cases, the Supreme Court has recently noted that schools generally have standing to assert the rights of parents. Runyon v. McCrary, 427 U.S. 160, 175 n.13 (1976), *citing*, Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925).

It has been suggested that the cluster of familial rights derived from these early cases may be encompassed by the notion of privacy[53] which the Supreme Court has held to be a fundamental right.[54] In *Roe v. Wade*, which challenged a criminal abortion statute, the Court said that the fundamental right of personal privacy "has some extension to activities relating to marriage . . . child rearing and education."[55] In the companion case of *Doe v. Bolton*, the enumeration of privacy rights included the "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception and the education and upbringing of children."[56] But, on another occasion, the Court made clear that "it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education."[57] Citing *Meyer* and *Pierce*, among other cases, the Court went on to say that it had "repeatedly stressed that while parents have a constitutional right to send their children to private schools . . . they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."[58] Childbearing decisions are sharply contrasted with educational decisions, in part, because of the unique and immediate social importance of education.

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[50] 262 U.S. 390, 399 (1923).
[51] 268 U.S. 510, 534-35 (1925).
[52] *Id.*
[53] *See, e.g.*, T. van GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM 165 (1976).
[54] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 497 (1965).
[55] 410 U.S. 113, 152-53 (1973).
[56] 410 U.S. 179, 211 (1973).
[57] Runyon v. McCrary, 427 U.S. 160, 178 (1976).
[58] *Id.*

The history of all of our cases from *Meyer* and *Pierce* to the present denies that any one person or political entity has the right to educate a child unfettered by competing considerations. This is reflected, for example, in the Supreme Court's decision in *Yoder*,[59] where familial and societal rights and interests were balanced in the context of a particular set of factual circumstances existing in a particular social and political setting at a particular time. The parents won the right to educate their children at home after the eighth grade, but the power of the state to provide education for citizenship and self-sufficiency was reaffirmed. The parents did not claim a total exemption for their children, and the state was empowered only to monitor the continuing program of vocational education.

An analysis of early common law coupled with a review of the most relevant Supreme Court decisions leads to the conclusion that parents would probably not be successful in asserting an absolute right to educate their children at home. It would appear that the parents and the state have shared rights and responsibilities with regard to the education of children, and that within reasonable state guidelines, the parents may select the educational alternative that meets their needs.

CONCLUSION

This chapter has highlighted the legal issues surrounding the provision of home education as an alternative to education provided in public or private schools. A review of the education statutes indicates that a majority of states explicitly or implicitly permit home education. Most courts that have considered the issue have been willing to interpret "education elsewhere," "otherwise educated" or "private school" as permitting home instruction. Courts have also generally upheld the right of parents to educate their children at home when the purpose of home instruction is not to violate the attendance statutes, when the education provided is substantially equivalent to that received in a public school and when the children are taught by a competent individual. Although some states require teacher certification for home educators; in states where certification has not been mandated by statute, it has not been required by the courts.[60]

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[59] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[60] For an interesting analysis of each states' compulsory education statute including whether or not it requires teacher certification, *see* P. LINES, *Private Education Alternatives and State Regulations*, EDUCATION COMMISSION OF THE STATES (March 1982). For a detailed review of the home education case law *see Cases on Home Education*, NOLPE CASE CITATIONS (1st Series May 1982).

School administrators are increasingly being confronted with the legal and educational issues concerning home education. When they are required to evaluate a request for home instruction, administrators may wish to consider the guidelines suggested by Judge Greaney in the *Perchemlides* decision:

- Is the home instructed child receiving at least the same number of hours of instruction in the courses required in the public school?
- Are the parents or individuals competent to teach and are they teaching diligently, consistantly and in good faith? (It should be determined if your state law requires home instruction to be offered by a certified teacher.)
- Are the materials, texts, methods and procedures adequate?
- Will the child be tested periodically to measure educational progress and to ensure that minimal standards are being maintained?[61]

Administrators should also be aware that certain procedural safeguards may be necessary when considering a home instruction request. The *Perchemlides* court ruled that parents are entitled to a hearing in seeking approval to educate their child at home. Administrators may want to consider the elements that were enunciated by Judge Greaney:

- Prior notice of the purpose and subject of the hearing in reasonable detail.
- The right to call witnesses and examine them.
- The right to be represented by counsel, if desired.
- A "neutral" and detached hearing body (school board).
- Some form of transcript or record.
- Compliance with open meeting laws.
- A statement of specific reasons for a decision to deny approval.[62]

In addition to considering the above substantive and procedural guidelines, educators should become familiar with the compulsory education statutes and court decisions of their own jurisdictions. This will help to ensure that decisions regarding home education will be both legally and educationally sound.

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[61] Perchemlides v. Frizzle, Civil No. 16641, slip op. at 28. *See, supra* n.34.

[62] *Id.* at 29.

The often repeated purposes of American education, as derived from the legal literature, relate to the development of individual self-sufficiency, to the development of citizenship capabilities, to the preservation of democracy, and to self-realization. Even more fundamentally, in the early cases, education seems to have been closely associated with the idea of nurturance—providing very young children with the necessities of life. The parents as well as the society as a whole have interests in all of these purposes to varying degrees. And while the children themselves have actual and potential interests in their own education, because of their immaturity, it cannot logically be said that they have an interest in *effecting* their own education—at least in the early years.

The education of the child in American society generally follows the developmental process, with the parent assuming initial responsibility. That responsibility is later shared by the state, and finally is assumed by the individual upon reaching maturity. Common law, judicial decision, and theoretical analysis amply support the proposition that education in American society is a vitally important endeavor. The manner in which we resolve the questions concerning home education should be consistent with our commitment to providing a quality education for all children in a fundamentally pluralistic society.

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Financing Educational Facility Construction: Prevailing Wage Litigation

STEVEN M. GOLDBLATT AND R. CRAIG WOOD

Steven M. Goldblatt is Chairman and Associate Professor, Department of Building Construction, University of Washington at Seattle. He received a B.S. in Electrical Engineering from the University of California, Berkeley and a J.D. degree from Golden Gate University School of Law. He is a licensed electrical engineer and a member of the California Bar.

R. Craig Wood is Assistant Professor of Educational Administration, Department of Education, Purdue University. He received his Ed.D. degree from Virginia Polytechnic Institute and State University. Dr. Wood has made numerous national, regional and local presentations in the areas of finance and law. His publications are numerous also specializing in finance and law. He is consultant to Public Financial Systems, Inc. of Minneapolis in representing school boards for incurring long term bonded indebtedness.

As educators are aware, the financing of educational facilities has become more expensive and complex with the passage of every school year. Educators are presently engaged in building, renovating, and demolishing school facilities due to changing educational programs, demographic movements, and energy conservation. Funding such construction is inhibited by many factors, including: budgeting constraints, reluctance of taxpayers to support education at previous levels, less successful bond referenda, fluctuating interest rates, and escalating construction labor costs.

In many states, public works labor costs are prescribed by prevailing wage laws which often have added to public schools' overall costs. The prevailing wage statutes, which dictate labor costs for most school district construction, have recently faced increasing pressure as a result of public attitudes generally less hospitable to the organized labor movement.

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Public school administrators are charged with the responsibility of providing educational services, including educational facilities, in the most cost-effective manner possible. Likewise, school boards are generally delegated the responsibility by the state legislature of providing a complete educational program, including the facilities in which they must be housed. This responsibility is interwoven with the local community's ability to pay and the state's financial assistance program for capital outlay and debt service. Numerous studies have shown that capital outlay programs are rarely equalized. The vast majority of states rely to a certain degree on the local school district's wealth as opposed to the wealth of the state as a whole. Only Florida, Hawaii, and Maryland have complete state support for capital outlay and debt service for school districts.

The ability to pay, or lack thereof, is affected in those states where the legislature has provided that school districts must observe a prevailing wage statute. There is little wonder, given the current economic climate, as to why public school administrators, school boards, and their attorneys have challenged this concept in many states.

Since the passage of most state prevailing wage laws during the depression, courts have been active in interpreting much of the vague statutory language directly affecting schools. Litigation has often focused on questions of procedural criteria, wage rate determinations, and local school board authority. These questions persist, yet contemporary issues of a more substantive nature are emerging in the courts: unconstitutional delegation of legislative authority, unlawful authority of a state labor agency over public school districts, and unlawful delegation of a discretionary power to make wage rate determinations.

In view of the timely concerns facing public education, this commentary presents an up-to-date analysis of state prevailing wage laws which impact educational facility construction and highlights relevant prevailing wage litigation from many states.

STATES WITH NO PREVAILING WAGE LAW FOR PUBLIC WORKS

Thirteen states currently have no prevailing wage law for public works. Nine of those states have not enacted prevailing wage laws: Georgia, Iowa, Mississippi, North Carolina, North Dakota, South Carolina, South Dakota, Vermont, and Virginia. Three states have recently repealed their prevailing wage laws: Alabama, Florida, and Utah. Arizona's prevailing wage law was recently found unconstitutional.

Alabama's 1969 prevailing wage law was repealed effective May 19, 1980.[1] Application to school construction was not implied from statutory language which limited the law's coverage to "state" construction contracts in excess of $2000.[2] The 1979 state legislature passed a repeal bill which became effective at the close of the 1980 regular session.[3]

Florida's 1933 prevailing wage law was repealed effective April 25, 1979.[4] Application to school construction or repair for contracts in excess of $5000 was implied from statutory language.[5] School boards were not authorized to include "state wage rates" in construction contract documents.[6] Contracts executed prior to repeal remained subject to the law's provisions until April 25, 1981.[7]

Utah's 1953 prevailing wage law was repealed on March 3, 1981.[8] Application to school construction was implied from statutory language.[9] The bill became law when the Republican majority in both state houses voted to override Democratic Governor Matheson's veto.[10] However, Utah law retains a provision similar to other states: construction of school facilities financed in some part by federal funds subjects the school district to the terms of the Davis-Bacon Act.[11]

Arizona's prevailing wage law, first enacted in 1912, had evolved to a point where it was challenged during the 1970s as an unlawful delegation of legislative power to organized labor.[12] It called for every construction, alteration, or repair contract in excess of $1000 with the state or a political subdivision to contain a provision that the rate of wages for contractor's and subcontractor's workers be not less than the prevailing rate of wages paid for similar work in the political subdivision where the project was located.[13] The prevailing rate was determined according to local union scale:

> For the purpose of determining the general prevailing rate of per diem wages, the industrial commission of Arizona shall ascertain and keep on record the rates or scale of per diem

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[1] 1979 Ala. Acts No. 122 at 154

[2] ALA. CODE §§ 39-4-2, 39-4-4 (1975 & Supp. 1982).

[3] 1979 Ala. Acts No. 122 at 154.

[4] 1979 Fla. Laws Ch. 79-14 § 1.

[5] FLA. STAT. ANN. § 215.19 (West 1971 & Supp. 1981).

[6] 1976 Op. Atty. Gen. No. 076-154.

[7] 1979 Fla. Laws Ch. 79-14 § 3.

[8] 1981 Utah Laws Ch. 165 § 1.

[9] UTAH CODE ANN. § 34-30-2 (1953 & Supp. 1981).

[10] Engineering News-Record, March 12, 1981 at 81.

[11] UTAH CODE ANN. § 53-1-2 (1953 & Supp. 1981).

[12] THIEBLOT, PREVAILING WAGE LAWS OF THE STATES AND THE DISTRICT OF COLUMBIA (The Merit Shop Foundation, Ltd. 1980) at 7-8.

[13] ARIZ. REV. STAT. ANN. § 34-322(a) (1974).

> wages required to be paid to each craft or type of workman belonging to or affiliated with the American Federation of Labor, the Arizona State Federation of Labor, or any other state or national labor organization similarly constituted, prevailing in the locality in which the public work is to be performed. If such method of arriving at the general prevailing rate of per diem wages cannot reasonably and fairly be applied in a political subdivision of the state for the reason that no such organization is maintained in the political subdivision, the industrial commission shall determine the prevailing rate to be the rate required to be paid to each craft or type of workman of the same or most similar class, working in the same or most similar employment in the nearest and most similar neighboring locality, and affiliated with any such labor organization.[14]

In a school district construction case, *Rogers v. Speros Construction Company, Inc.*, the Arizona Court of Appeals avoided ruling on the law's constitutionality:

> [The contractor] argue[s] in support of dismissal for lack of jurisdiction over the subject matter that the public works statute upon which plaintiffs' claims are predicated is unconstitutional, in that the criteria to be used by the industrial commission under A.R.S. § 34-324(a) involves an unlawful delegation to the labor organizations named in the statute of the power to establish the prevailing rate.
>
> We find the argument and cases cited by [the contractor] in support thereof to be inapposite. Plaintiffs' claims are predicated on the contract itself, and not upon the challenged statute.[15]

On September 11, 1979, the Arizona Court of Appeals found the statute unconstitutional. In *Industrial Commission v. C & D Pipeline*, the court stated:

> [T]he law in question goes too far in requiring public authorities to accept the terms of employment fixed by [labor unions] without having the right to determine their reasonableness. We therefore hold that the entire statute cannot be constitutionally sustained. . . . A.R.S. § 34-324(a) is unconstitutional in its entirety.[16]

STATES WITH PREVAILING WAGE LAWS FOR PUBLIC WORKS

Thirty-seven states and the District of Columbia currently have prevailing wage laws for public works. Of those, Arkansas and Kentucky specifically exclude school districts from coverage under their prevailing wage laws.

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[14] *Id.* at § 34-324(a).

[15] 580 P.2d 750, 752-3 (Ariz. Ct. App. 1978).

[16] 607 P.2d 383, 387 (Ariz. Ct. App. 1979).

Arkansas' 1969 prevailing wage law requires that any "public body" engaged in construction (not maintenance) of public works, in excess of $75,000, pay its workers not less than the "minimum prevailing hourly rate of wages" for similar work done in the county.[17] The general definition of "public body" includes any municipality or political subdivision.[18] However, public school construction is specifically excluded from the above act, unless federal matching funds are used to help pay for the construction.[19]

Kentucky's prevailing wage law, first passed in 1940, was extensively modified during the 1970s.[20] On March 8, 1982, it was amended once again; Democratic Governor John Brown let it become law without his signature.[21]

Under the new law all contractors and subcontractors under contract to any "public authority" for "construction" of "public works" must pay all workers performing under the contract not less than the prevailing rate of wages determined by the Commissioner of Labor.[22] "Construction" now must exceed $250,000 to come under the law.[23] "Public works" include all structures financed with fifty percent or more of state funds "except for buildings constructed as institutions of learning."[25]

School districts in Kentucky had operated under one of the most complex and litigated prevailing wage statutes in the country. The original law as modified had been interpreted by the courts at least four times in school facility construction cases.

In *Baughn v. Gorell and Riley*, where on a school facility project the prevailing wage statute was challenged, the court of appeals upheld the validity of the law for public projects and the authority of public bodies (*e.g.*, school boards) to exercise the discretionary power of fixing fair or prevailing wages. In reaching its conclusion, the court upheld this activity as long as there were no delegations of those powers to a private organization.[26]

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[17] ARK. STAT. ANN. § 14-632(1) (1979).

[18] *Id.* at § 14-630(6).

[19] *Id.* at § 14-632(1).

[20] THIEBLOT, PREVAILING WAGE LAWS OF THE STATES AND THE DISTRICT OF COLUMBIA (The Merit Shop Foundation, Ltd. 1980) at 12.

[21] 1982 Ky. Acts ch. 54.

[22] KY. REV. STAT. ANN. §§ 337.510, 337.530 (Baldwin 1979).

[23] *Id.* at § 337.010(3)(a).

[24] *Id.* at § 337.010(3)(d).

[25] *Id.* at § 337.010(3)(e).

[26] 24 S.W.2d 436 (Ky. Ct. App. 1949).

In *Kerth v. Hopkins County Board of Education*, the board challenged the decision of the Prevailing Wage Board in setting a prevailing wage schedule for public works. The Hopkins County Board of Education contended that, in the absence of local negotiated construction contracts, no basis in fact existed for the determination of prevailing wages. In the absence of such mechanisms the Prevailing Wage Board assumed an unlawful position of authority in arbitrarily establishing such rates. The court of appeals agreed with the plaintiffs that no stated mechanisms existed for the Prevailing Wage Board to establish such rates in areas in which no negotiated labor contracts existed. The court further stated "where intervention of the legislature is so obscure as to defy rational meanings, law cannot be given effect." Inasmuch as a state legislature may not lawfully delegate its decision-making authority to an agency, it must, as the court stated, "prescribe some standard governing the scope of administrative action," or the courts will find such actions to be an unregulated, discretionary action. In summary, the court ruled that without specific statutory guidelines such prevailing wage rates were invalid.[27]

In *Board of Education of Campbellsville Independent School District v. Faulkner*, the Kentucky Court of Appeals issued rulings concerning a number of procedural issues as well as limiting the liability of a board of education concerning a typographical error where prevailing wage litigation was involved.[28]

The most recent case in Kentucky prior to the 1982 amendments was *Young v. Neale* wherein the appellate court addressed several issues, ruling that the composition of a Prevailing Wage Board, in representing certain interests, is not within itself a violation of due process although board members may be questioned as to their personal involvement in such projects.[29]

Eleven states specifically include school districts in their prevailing wage laws: Alaska, Idaho, Illinois, Michigan, Montana, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania and Wisconsin. Maryland's prevailing wage law was found to include school districts by case law. Three states' prevailing wage laws were found to include school districts by Attorney General opinion: New York, Texas and Washington.

Alaska's 1949 prevailing wage law states that contractors and subcontractors who do "public construction" work in excess of $2000 must pay their workers at least the current prevailing minimum wage for similar work in the region.[30] "Public construction" includes construction, erection, rehabilitation, alteration, extension, or repair done under contract to a regional school board or any "political subdivision" of the state.[31] "Political subdivisions" required to follow the above provisions include any "state university" or "school district."[32] Fringe benefits are included.[33]

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[27] 346 S.W.2d 737, 741 (Ky. Ct. App. 1961).
[28] 443 S.W.2d 853 (Ky. Ct. App. 1968).
[29] 457 S.W.2d 358 (Ky. Ct. App. 1969).

Idaho's 1933 prevailing wage law survived a repeal attempt in March 1982. Democratic Governor John Evans vetoed the repeal bill that had passed the state legislature.[34]

The law states that there must be a provision in all contracts for school construction, repair, or maintenance work requiring the contractor to pay the "standard prevailing rate of wages" paid in the county seat.[35] Fringe benefits are included.[36]

Under Illinois' 1941 prevailing wage law, not less than the prevailing rate of wages must be paid to all workers employed by contractors or subcontractors on behalf of any "public body" engaged in the construction (excludes maintenance) of "public works."[37] "Public works" means all fixed works constructed for public use by any public body, except maintenance. "Public body" means the state or any political subdivision, including school districts.[38] The public body is charged with determining the prevailing rates or having the Department of Labor do so.[39] Fringe benefits are included.[40]

In *Fox River Valley District Council of Carpenters v. Board of Education*, the Illinois Appellate Court (Second District) denied a remedy to the labor union for the school district's violation of the law: "[I]t is not within the province of the trade councils to determine whether such prosecution shall be instituted."[41]

Less than three months later, in *Beaver Glass and Mirror v. Board of Education*, the same Illinois court denied a remedy to the unsuccessful bidder for a school district glass replacement contract that had since been performed:

> [T]he contract was one for "maintenance work". . . . It is clear that the statutory requirement of letting bids to the "lowest

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[30] ALASKA STAT. §§ 36.05.010, 36.05.070 (1962 & Supp. 1982).

[31] *Id.* at § 36.95.010(3).

[32] *Id.* at § 36.95.010(6).

[33] *Id.* at § 36.95.010(7)

[34] Engineering News-Record, April 1, 1982 at 63.

[35] IDAHO CODE § 44-1002 (1977).

[36] *Id.* at § 44-1006.

[37] ILL. ANN. STAT. ch. 48 § 39s-3 (Smith-Hurd Supp. 1981).

[38] *Id.* at § 39s-2.

[39] *Id.* at § 39s-4.

[40] *Id.* at § 39s-2.

[41] 373 N.E.2d 60, 63 (Ill. App. Ct. 1978).

> responsible bidder" applied to the contract in this case and that the statute mandating payment of the "prevailing hourly rate" did not. [T]he petitioners had no entitlement to damages regardless of whether or not the Board acted properly in awarding the glass replacement contract to the higher bidder, and it is no longer possible for a court to grant coercive relief.[42]

In 1965, the Michigan Legislature passed a prevailing wage law that required on all "state projects" with a "contracting agent" the payment of prevailing wage rates and fringe benefits by the contractor.[43] Based on a lack of specific inclusion of school districts in the statute, the Michigan Attorney General issued an opinion in 1968 stating that school districts were included under the prevailing wage law because a school facility project was a "state project." The opinion stated:

> [O]fficer . . . of the state . . . includes members of boards of education and therefore local school district construction is included within the purview of this act [and] since boards of education are officers of the state, any money they receive from whatever source, including from local bonded indebtedness . . . become state funds. . . .[44]

In February 1975, a class action suit was brought on behalf of several construction trade unions for the purpose of forcing the Coloma School District to observe the requirements of the Michigan prevailing wage statutes. In *Bowie v. Coloma School Board*, the plaintiffs contended that all school districts were to be included under the definition of "state projects." The plaintiffs sought injunctive relief as well as the differentials between the actual rates and the prevailing rates.[45]

The court of appeals rejected the plaintiffs' argument based on the narrow interpretation of what constituted a "state project" under the law; it stated that school districts were not specifically mentioned within the prevailing wage statutes. The court felt that, inasmuch as criminal penalties were included in the statute if a violation of the law were found, the doctrine of strict scrutiny was applicable.[46]

The court placed great weight on its examination of legislative history of the act and whether or not the legislature had intended to treat all school boards as officers of the state and all school construction projects as "state projects." The court concluded that the legislature never intended all school boards nor all school construction projects to be interpreted as part of the statute.[47]

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[42] 376 N.E.2d 377, 379 (Ill. App. Ct. 1978).
[43] MICH. STAT. ANN. § 17.256(2) (Callaghan 1982).
[44] 1968 Op. Atty. Gen. No. 4371.
[45] 227 N.W.2d 298 (Mich. Ct. App. 1975).
[46] *Id.* at 302.
[47] *Id.* at 300.

In 1978, the Michigan legislature passed an amendment to the law (effective March 30, 1979) which, among other minor changes, specifically included school districts in its purview. "State project" now includes schools.[48] "Contracting agent" now includes school boards.[49] "Locality" now includes school districts.[50]

In *West Ottawa Public Schools v. Babcock*, the Michigan Court of Appeals overturned a lower state court decision which found the new law unconstitutional because it delegated legislative power to establish prevailing wages for state projects to private, union-management groups:

> The Michigan Legislature has not delegated any legislative, policy-making authority to the Department of Labor. The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality. The Department of Labor's determination of that prevailing wage does not amount to the setting of any state policy. The Department is merely authorized to implement what the Legislature has already declared to be the law of Michigan.[51]

Montana's 1931 prevailing wage law calls for every contract for school construction, services, repair, or maintenance to contain a provision, in the bid specification and the contract itself, that the contractor will pay the standard prevailing rate of wages and fringe benefits in the county or locality.[52] Non-union contractors must pay the fringe benefits as part of the wages.[53]

Nebraska's 1939 prevailing wage law provides that state governing authorities must require in every contract for public works' construction, remodel, or repair a provision that "fair labor standards" be maintained.[54] "Fair labor standards" mean the use of a prevailing wage rate paid by at least half of other contractors in the same business.[55] School districts are specifically included.[56]

Under Nevada's 1937 prevailing wage law, a contract to which a "public body" of the state is a party and which requires the employment of workers to perform "public work" shall expressly state the wage rate to be paid each class of worker. This wage rate must be at least the prevailing rate in the county or district where the job is located.[57] Fringe benefits are included.[58] A "public body" includes a school district or any state agency or political subdivision sponsoring or financing public work.[59] "Public work" is generally defined to include any new construction, repair, or reconstruction of public buildings whose cost as a whole exceeds $4000.[60]

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[48] MICH. STAT. ANN. § 17.256(1)(b) (Callaghan 1982).
[49] *Id.* at § 17.256(1)(c).
[50] *Id.* at § 17.256(1)(e).
[51] 309 N.W.2d 220, 224 (Mich. Ct. App. 1981).
[52] MONT. CODE ANN. § 18-2-403(1) (1981).
[53] *Id.* at § 18-2-405.
[54] NEB. REV. STAT. § 73-102, 73-106 (1981).
[55] *Id.* at § 73-104.
[56] *Id.* at § 73-101.

Oklahoma's 1965 prevailing wage law requires that a "public body" awarding a contract for "public works" includes a stipulation that all workers will be paid not less than the prevailing hourly rate of wages.[61] A "public body" includes any board or political subdivision of the state.[62] "Public works" include all fixed works constructed for public use whether or not under public supervision or paid in any part by public funds.[63] Construction, reconstruction, improvement, enlargement, alteration, painting, decorating, and major repair are covered.[64] Maintenance is not covered.[65] Fringe benefits are included.[66] Under the "building construction" category, schools are specifically included.[67]

Oregon's 1959 prevailing wage law requires that the hourly rate of wages paid to workers on all "public works" by the contractor or subcontractors be not less than the prevailing rate of wages paid in the trade in that "locality."[68] "Public works" are "public improvements" done under "public contract" in excess of $2000.[69] "Public improvement" means construction, reconstruction, or major renovation and excludes repair, maintenance, minor alteration, and emergency work.[70] A "public contract" includes a contract made with a school district.[71] Fringe benefits are included.[72] "Locality" is precisely defined as one of fourteen districts, each comprised of varying numbers of counties and together covering the entire state.[73]

Pennsylvania's 1961 prevailing wage law states that not less than the prevailing minimum wage must be paid to all workers employed on

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[57] NEV. REV. STAT. § 338.020(1) (1981).
[58] *Id.* at § 338.010(4).
[59] *Id.* at § 338.010(2).
[60] *Id.* at § 338.010(3).
[61] OKLA. STAT. ANN. tit. 40, § 196.5 (West 1951 & Supp. 1981).
[62] *Id.* at § 196.2(6).
[63] *Id.* at § 196.2(7).
[64] *Id.* at § 196.2(1).
[65] *Id.* at § 196.3(A).
[66] *Id.* at § 196.2(3).
[67] *Id.* at § 196.6(A)(1).
[68] OR. REV. STAT. § 279.350(1) (1981).
[69] *Id.* at § 279.348(3).
[70] *Id.* at § 279.011(3).
[71] *Id.* at § 279.310(1).
[72] *Id.* at § 279.348(1).
[73] *Id.* at § 279.348(2).

"public work."[74] "Public work" means construction, reconstruction, demolition, alteration, or repair work other than maintenance work done under contract in excess of $25,000 with a "public body."[75] "Public body" means the state or any political subdivision.[76]

In addition, Pennsylvania's 1949 public school law provides that all contracts awarded by any school district must stipulate the employment of "competent" workers, defined as those who are paid not less than the current rate of wages paid by "employers of organized labor in doing of similar work in the district where work is being done."[77] Further,

> The specifications upon which contracts are entered into by any school district for the construction, alteration, or repairs of any public work or improvement may, at the option of the school district, contain the minimum wage or wages which may be paid by the contractor or his sub-contractors for the work performed by laborers and mechanics employed on such public work or improvement, and such laborers and mechanics shall in such cases be paid not less than such minimum wage or wages.[78]

Taken together, the language of the two statutes includes school districts under prevailing wage coverage and sets those wages generally at local union rates.

Two cases have come before the Pennsylvania courts regarding school facility construction and the prevailing wage statutes.

In *Campbell v. School District of Borough of Bellevue*, the Pennsylvania Supreme Court ruled that the observance of federal guidelines as to workers' wage rates, hours of employment, and other terms was not a violation of the state's requirement of awarding bids to the lowest responsible bidder.[79]

In *Keystone Chapter of Associated Builders and Contractors v. Commonwealth*, suit was brought by a "merit shop" contractors' association to enjoin the decision of the State Department of Labor and Industry regarding the manner in which wage rates were determined for a school addition project. The court made a number of important decisions:

> [T]he Board made no error of law in affirming the Secretary's designation of Lancaster County as the "locality" for the purpose of determining the prevailing minimum wage rates for the Solanco project.[80]

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[74] PA. STAT. ANN. tit. 43 § 165-5 (Purdon 1964).
[75] *Id.* at § 165-1(5).
[76] *Id.* at § 165-1(4).
[77] *Id.* at tit. 24 § 7-752.
[78] *Id.* at § 7-753(a).
[79] 195 A. 53, 54 (Pa. 1937).
[80] 414 A.2d 1129, 1133 (Pa. 1980).

> [T]he Act does not mandate that the prevailing wage rates be determined solely by the rates in collective bargaining agreements, which include fringe benefits. The Secretary may ascertain and consider the wage rates and benefits set by collective bargaining agreements; but the Secretary also may consider other information, including that voluntarily submitted by any contractors and subcontractors, if presented in the required form.[81]
>
> Collective bargaining agreements, therefore, are not the only source of information used by the Secretary to determine prevailing wage rates. If the collected data shows non-union construction to be the dominating segment of the industry, its wage rates should prevail as the general minimum wage rates for Lancaster County.[82]
>
> The Department granted Petitioner equal opportunity to offer documentary evidence and testimony supporting its method of determining the prevailing rate and the figures at which it arrived. Thus the Department did not deny Petitioner equal protection. The Department acted within its legislatively authorized discretion in interpreting "prevailing" to mean "most frequent."[83]
>
> [I]n their evaluation of the prevailing wages at the Department hearing, the non-union parties may and should at least offer estimates as to future wage rates.[84]

Under Wisconsin's amended 1933 prevailing wage law, workers employed directly upon the site of a public works project in excess of $35,000 (adjusted every two years) by a contractor or subcontractor for a "municipality" must be paid at least the prevailing wage rate for the most similar occupation. This wage rate must be made part of the contract.[85] A "municipality" is defined to include vocational, technical, and adult education districts, common school districts, union high school districts, and unified school districts.[86] Erection, construction, remodeling, and repair are all covered.[87] Fringe benefits are included.[88]

Maryland's reenacted 1969 prevailing wage law calls for the payment of prevailing wages on "public works" construction.[89] "Public works" include all structures "constructed for public use or benefit or paid for totally or in part out of public funds," excluding contracts of less than $500,000.[90] "Public body" means the state or any political subdivision "when State public funds are the only funds used for the construction of a particular public works. . . ."[91] Construction, reconstruction, improvement, enlargement, painting, decorating, alteration, maintenance, and repair are covered.[92] Fringe benefits are included.[93]

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[81] *Id.*

[82] *Id.* at § 1134.

[83] *Id.*

[84] *Id.*

[85] Wis. Stat. Ann. § 66.293(3) (West Supp. 1982).

[86] *Id.* at § 66.293(3)(b).

[87] *Id.* at § 103.49(1) (West 1974).

[88] *Id.* at § 103.49(2).

[89] Md. Ann. Code art. 21 § 8-505 (1957 & Supp. 1981).

The law was found to include school districts. In *Demory Brothers v. Board of Public Works*, the Maryland Court of Appeals stated:

> It is clear and unmistakable that the General Assembly intended that the Public School Construction Program should be administered in conjunction with the "Prevailing Wage Law."[94]

New York's prevailing wage law dates back to 1897, with many amendments since then.[95] The law calls for workers on "public works" to be paid not less than the prevailing rate of wages.[96] "Public works" generally include projects involving a contract to which the state or a municipal corporation is a party.[97] Fringe benefits are included.[98] Construction, reconstruction, maintenance, and repair are covered.[99]

The law was found to include school districts' construction in three early Attorney General opinions.[100]

Under Texas' 1933 prevailing wage law, all workers employed by or on behalf of the state or any county, district, or political subdivision and engaged in the construction (not maintenance) of "public works" must be paid at least the general prevailing rate of per diem wages for work of a similar character in the locality.[101] "Public works" include any construction or repair work done under contract and paid for at least in part by public funds, whether or not it is done under public supervision.[102]

Texas' law as found to include school districts in an early Attorney General opinion:

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[90] *Id.* at § 8-501(c).

[91] *Id.* at § 8-501(d)(1).

[92] *Id.* at § 8-501(b).

[93] *Id.* at § 8-501(e)(2).

[94] 329 A.2d 674, 677 (Md. Ct. App. 1974).

[95] N.Y. Lab. Law § 220 (McKinney 1965).

[96] *Id.* at § 220(3).

[97] *Id.* at § 220(2).

[98] *Id.* at § 220(5).

[99] *Id.* at § 220-d.

[100] 1899 Op. Atty. Gen. No. 302, 1899 Op. Atty. Gen. No. 305, 1932 Op. Atty. Gen. No. 257.

[101] Tex. Rev. Civ. Stat. Ann. art. 5159a(1) (Vernon 1970).

[102] *Id.* at art. 5159a(4).

> The construction of a school building by an independent school district is such as would be governed by this law, coming within the terms "district or other political subdivision of the State engaged in the construction of the public works," since public funds, at least in part, are expended in such construction.[103]

More recently, the Attorney General found that fringe benefits may be included in the prevailing wage: "In the public body's discretion, the prevailing wage set may include the value of fringe benefits available to employees of the area engaged in similar kinds of labor."[104]

A Texas appellate court reached an interesting decision in a case where a contractor was sued by its former employees for back wages on the basis that it failed to pay prevailing wages on a school district construction contract. The call for bids and the contracts in this case did not contain a schedule of prevailing wage rates as required by the statute. In *Cullipher v. Weatherby-Godbe Construction Co., Inc.*, the court stated:

> [I]t was a prerequisite to recovery by the workers that they prove that a prevailing wage rate schedule had been determined by the School District and that the schedule was included in the contract and call for bids. The only evidence presented shows that the School District took no action to adopt a wage rate schedule until Janury 9, 1974, a time after which all the pertinent contracts had been issued. The workers are thus precluded from recovery because no prevailing wage rate schedule had been determined "in dollars and cents" by the School District prior to the call for bids and the signing of the contracts.
>
> The rights of workers to receive a prevailing wage rate is strictly a matter of statutory authorization. This is a matter which may need legislative attention and only that body has the authority to amend the statute which will eliminate the problem pointed out in this case.[105]

Washington's 1945 prevailing wage law calls for workers constructing any public works for the state, a municipality, or a political subdivision to be paid hourly wage not less than the prevailing rate of wages in the locality. Workers employed directly by the state, municipality, or political subdivision are not covered.[106] Fringe benefits are included.[107]

Washington's law was found to include school districts in an Attorney General opinion: "[W]here a school district undertakes any public work by contract it must require the contractor to pay the prevailing wage and comply with other provisions of chapter 39.12 RCW. . . ."[108]

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[103] 1939 Op. Atty. Gen. No. 416.

[104] 1974 Op. Atty. Gen. No. H-350.

[105] 570 S.W.2d 161, 164 (Tex. Civ. App. 1978).

[106] WASH. REV. CODE ANN. § 39.12.020 (1972).

[107] *Id.* at § 39.12.010(1).

Clarifying the school employee issue, a later Attorney General found:

> Chapter 39.12 RCW . . . does not apply when a school district directly hires noncertified craft or trade union members on a regular basis to perform work on school district property under the supervision of the school district administrators.[109]

The Washington Supreme Court has ruled that trade union councils have the right to seek enforcement of the prevailing wage law. In *Southeastern Washington Building and Construction Trades Council v. Department of Labor and Industries*, the court stated:

> Unless workers or representatives of workers who are not parties to such a [public works' construction] contract but whose wages and expectancies are affected by its terms can be heard to complain of prevailing wage determinations, the interest of such workers may very well be left unprotected.[110]

Six states' prevailing wage laws are assumed to include school districts by case law: California, Indiana, Kansas, New Hampshire, New Jersey and Ohio. Nine states' and the District of Columbia's prevailing wage laws are implied to include school districts generally as governmental subdivisions engaged in public works using state funds: Connecticut, Delaware, District of Columbia, Hawaii, Louisiana, Massachusetts, Missouri, New Mexico, Rhode Island and West Virginia.

California's 1937 prevailing wage law calls for prevailing wages to be paid where "public works" in excess of $1000 are constructed.[111] Fringe benefits are included.[112] "Public works" include construction, alteration, demolition, or repair work done by the state or a "political subdivision" paid for by public funds.[113] "Political subdivision" means any district of the state.[114]

The law survived a recent challenge when committees in the state senate rejected a repeal bill in January 1982.[115]

The law is assumed to include school districts. In *Shalz v. Union School District*, the California Court of Appeal stated:

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[108] 1959-60 Op. Atty. Gen. No. 156.
[109] 1971 Op. Atty. Gen. No. 1.
[110] 586 P.2d 486, 488 (Wash. 1978).
[111] Cal. Lab. Code § 1771 (West 1971 & Supp. 1981).
[112] *Id.* at § 1773.1.
[113] *Id.* at § 1720(1).
[114] *Id.* at § 1721.
[115] Engineering News-Record, January 28, 1982 at 60.

> [T]he contractor agreed to conform to a certain resolution previously adopted by the school district.... The provisions contained in the resolution were in accordance with sections 1770, 1772, 1773 and 1774 of the Labor Code of California....[116]

Under Indiana's 1935 prevailing wage law, anyone awarded a contract by the state or any political subdivision for construction of any public work is required to pay each class of work "not less than the prevailing scale of wages being paid in the immediate locality...." The awarding governmental agency sets up a committee of three to determine wage rates: one person chosen by the governor, one chosen by the agency, and one chosen by "the president of the state federation of labor."[117]

The law is assumed to include school districts. In *State v. Curtin*, the Indiana Supreme Court found that where a majority of the committee appointed to determine prevailing wage scales for bids on a contract to erect a high school addition "arbitrarily and capriciously submitted a scale of wages not prevailing in the immediate locality ... the schedule filed by them cannot be binding ... [and] is voidable...."[118]

In a case from higher education, *Lesh v. Trustees of Purdue University*, the Indiana Appellate Court ruled that only prevailing wages as established by the state were, in fact, a part of the bidding and awarding process. Wages paid above the established rates, in order to assure completion of a public project, were costs to be borne by the contractor.[119]

In *Committee for Prevailing Wage Scale v. Zeller*, the court heard a challenge by two members of a wage-setting committee against the third member on an elementary school library addition project. The court ruled:

> [T]he said committee appointed to establish the wage scale for the various classifications of labor failed to execute its duties by not making an investigation of the facts as they then existed and upon which to predicate a determination thereof. Each committee member, in his own way, the evidence indicates, proceeded to act without regard to the other members of the said committee.... There appears to have been no real investigation in the locality and conclusions based upon such investigation to support the majority report.[120]

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[116] 137 P.2d 762, 763 (Cal. Ct. App. 1943).
[117] IND. CODE ANN. § 5-16-7-1 (Burns Supp. 1982).
[118] 26 N.E.2d 909, 911 (Ind. 1940).
[119] 116 N.E.2d 117, 129-1 (Ind. App. Ct. 1953).
[120] 208 N.E.2d 697, 703 (Ind. App. Ct. 1965).

In March 1982, the Shelbyville Central School Corporation filed suit against the state to overturn the prevailing wage statute. School officials contended that the rate set by the state for rural Shelbyville always reflects the prevailing union wage for Indianapolis construction workers. The lawsuit claimed that the Indianapolis rate was usually "50 to 100" percent higher than the prevailing Shelbyville rate. School officials wanted to be able to use local construction firms without the state artificially increasing labor costs on projects. Shelbyville was planning a $2 million addition to an elementary school.[121]

> It violates the equal protection and due process clauses of the 14th amendment to the United States Constitution by: failing to define essential terms such as "wages" and "immediate locality;" failing to set adequate standards and guidelines for determining the prevailing wage scale; and unlawfully delegating authority to make law.
>
> It violates the Indiana Constitution by: failing to provide for judicial review of committee determinations; failing to define essential terms; and unlawfully delegating legislative authority.
>
> The school will suffer irreparable harm because: the contractors will sue the school, causing a delay in the project; and the school will spend significantly greater sums of public funds for the project than the lowest and best bids that could be obtained in a "free market" bidding process.[122]

Kansas' 1923 prevailing wage law, first established in 1891, states that contracts made by or on behalf of the state or a "municipality" must have a provision stipulating payment of the "current rate of per diem wages."[123]

The 1891 law was found to include school districts. In *State v. Wilson*, the Kansas Supreme Court stated: "[T]he lawmakers, by the use of the word 'municipality' . . . in the eight-hour law, intended to include school districts."[124]

The 1923 law is assumed to include school districts. In *State v. Blaser*, the Kansas Supreme Court stated:

> [S]ince the work here was being done in the city of Wichita, . . . the city is the locality referred to in the statute, although the contract done was made with the board of education of the city.[125]

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[121] Indianapolis Star, March 24, 1982.

[122] Associated General Contractors of Indiana Legal Bulletin, March 30, 1982.

[123] KAN. STAT. ANN. § 44-201 (1981).

[124] 69 P. 172, 173 (Kan. 1902).

[125] 26 P.2d 593, 595 (Kan. 1933).

New Hampshire's 1941 prevailing wage law is patterned after the Davis-Bacon Act. The amended statute covers all local and state construction, addition, or alteration contracts in excess of $500,000. Fringe benefits are included.[126]

The law is assumed to include school districts. In *Union School District of Keene v. Commissioner of Labor*, the New Hampshire Supreme Court recited the undisputed facts: "[T]he School District requested the Commissioner [of labor] to ascertain the prevailing wage rate for work to be done at Keene High School as provided in RSA 280:1."[127]

The court issued a comprehensive opinion upholding the law's constitutionality, ruling that

> [M]inimum wage should be paid to certain employees engaged in public works. [The Legislature] has prescribed standards to be followed to establish such a wage rate for any public project which may be involved. The task of acquiring information, working out the details and applying the rules and standards to specific cases has been conferred to the Labor Commissioner. This is not considered an unconstitutional delegation of legislative authority under our decision.[128]

New Jersey's 1913 prevailing wage law, reenacted in 1963, provides that every contract in excess of $2000 for "public work" must contain a stipulation that workers employed in the performance of the contract be paid not less than the "prevailing wage" rate.[129] "Public work" is defined as construction, reconstruction, demolition, alteration, repair, maintenance, painting, or decorating work "done under contract and paid for in whole or in part out of the funds of a public body."[130] The "prevailing wage" means a collectively bargained wage rate.[131] Fringe benefits are included.[132]

The statutory language, similar to that struck down in Arizona as unconstitutional, has been upheld. In *Male v. Renda Contracting Co., Inc.*, the New Jersey Appellate Court stated:

> We do not find that the act . . . presents a problem of delegation of legislative power. [T]he Commissioner has not been delegated power to perform a legislative function; rather, he has merely been granted the power . . . to determine a set of

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[126] N.H. Rev. Stat. Ann. § 280:1 (1977).
[127] 176 A.2d 332, 333 (N.H. 1961).
[128] *Id.* at 336.
[129] N.J. Stat. Ann. § 34:11-56.27 (West 1965 & Supp. 1982).
[130] *Id.* at § 34:11-56.26(5).
[131] *Id.* at § 34:11-56.26(9).
[132] *Id.* at § 34:11-56.30.

> facts, i.e., the wage rates established under collective bargaining agreements. . . .[133]

On *Renda's* appeal, the New Jersey Supreme Court found:

> The statute in question, N.J.S.A. 34:11-56.25 et seq., is not a true prevailing wage statute. . . . Only the wages fixed in collective bargaining agreements . . . are used. The result is that the parties who negotiate the collective bargaining agreements also establish the statutory wage rate for public works in the locality. Although this must be viewed as some form of delegation of legislative power to private parties, such delegation is not per se unconstitutional. . . . Considering the purpose and aim of the statute, it is clear that the delegation here involved meets the requirements of due process. . . . As long as due process is satisfied, the legislative formula must be upheld.[134]

The law is assumed to include school districts. In *Thomas v. Teaneck Board of Education*, the New Jersey Appellate Court ruled:

> The Prevailing Wage Act is applicable only in favor of employees of contractors and subcontractors on public work projects and not in favor of permanent or temporary employees of public subdivisions [here the school district] which themselves undertake public works projects.[135]

Ohio's reenacted 1965 prevailing wage law requires that every contract for public work contain a provision that each worker employed by a contractor or subcontractor on such public work be paid a prevailing rate of wages not less than that payable under local collective bargaining agreements.[136] The wage rate for each worker classification becomes part of the bid specifications for every "public authority" authorized to contract for a "public improvement."[137] "Public authority" includes the state or any political subdivision.[138] "Construction" includes reconstruction, improvement, enlargement, alteration, repair, painting, and decorating work in excess of $4000.[139] "Public improvement" includes all structures.[140] Fringe benefits are included.[141]

The law is assumed to include school districts. In *Hilton v. Board of Education*, the Ohio Appellate Court stated:

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[133] 301 A.2d 153, 157 (N.J. Super. Ct. App. Div. 1973).
[134] 314 A.2d 361, 362 (N.J. 1974).
[135] 446 A.2d 547, 549 (N.J. Super. Ct. App. Div. 1982).
[136] OHIO REV. CODE ANN. § 4115.05 (Page 1980).
[137] *Id.* at § 4115.04.
[138] *Id.* at § 4115.03(A).
[139] *Id.* at § 4115.03(B).
[140] *Id.* at § 4115.03(C).
[141] *Id.* at § 4115.03(E)(3).

> [T]he legislature has power to establish school districts and . . . to confer on the board of education of a school district power to legislate with reference to the construction of school buildings . . . and the terms and conditions upon which contracts for the construction of such school buildings should be let, including . . . the minimum wages to be paid, and, so far as we have been able to find, this power has never been questioned. . . . Section 17-4, General Code [[142]], conferring power on any public authority authorized to contract for public improvements to fix and determine a fair rate of wages to be paid by the successful bidder, is a valid legislative enactment authorized by the Constitution, and is not unconstitutional.[143]

Connecticut's 1937 prevailing wage law now applies to new construction in excess of $50,000 and remodeling, refinishing, refurbishing, rehabilitation, alteration, or repair in excess of $10,000.[144] All contracts by the state or any political subdivision for the construction of public works must contain the following clause:

> The wages paid on an hourly basis to any mechanic, laborer or workman employed upon the work herein contracted to be done . . . shall be at a rate equal to the rate customary or prevailing for the same work in the same trade or occupation in the town in which such public works project is being constructed.[145]

Fringe benefits are included.[146]

Delaware's 1953 prevailing wage law requires every contract for construction of public buildings or public works in excess of $2000, to which the state or any political subdivision is a party, for which the state appropriates part of the funds, which involves the employment of workers; to contain a provision stating the minimum wages to be paid based on the prevailing wage rate for similar projects in the area. Alteration, repair, painting, and decorating are covered. The wage rate is based on the average actual wages paid to a majority of workers.[147]

The District of Columbia's prevailing wage law is the federal Davis-Bacon Act. Under the law, every contract in excess of $2000, to which the District is a party, for construction, alteration, repair, painting, or decorating of public buildings or works within the District, which involves the employment of workers, must contain a stipulation that the workers will be paid no less than the prevailing wage rate for similar projects in the area. The prevailing wage rate will be determined by the Secretary of Labor.[148] Fringe benefits are included.[149]

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[142] *Id.* at § 4115.04.

[143] 1 N.E.2d 166, 170 (Ohio App. Ct. 1935).

[144] CONN. GEN. STAT. ANN. § 31-53(g) (West 1958).

[145] *Id.* at § 31-53(a).

[146] *Id.* at § 31-53(e).

[147] DEL. CODE ANN. tit. 29, § 6912(a) (1979).

Hawaii's 1955 prevailing wage law requires that every contract for construction of a public work in excess of $2000 to which a "governmental contracting agency" is a party state the minimum wages to be paid to the different classes of workers.[150] Minimum wages cannot be less than the prevailing wages for workers on similar projects in the state or less than the Davis-Bacon wage for the state.[151] Fringe benefits are included.[152] A "governmental contracting agency" includes any county, board, or commission of the state.[153] Alteration, repair, painting, and decorating are covered.[154]

Under Louisiana's 1968 prevailing wage law, every contract for construction, alteration, repair, painting, or decorating of public buildings or public works in excess of $25,000, where at least ninety percent of the funds involved are state or federal funds, where the state or any of its agencies or boards are parties, which involves payment of workers, must contain a provision regarding prevailing wages. The provision must state that the minimum wages to be paid various classes of workers will be based on prevailing wages for such work in the area.[155] Fringe benefits are included.[156] The Department of Labor is directed to consider local collective bargaining agreements and Davis-Bacon wage rates.[157]

Massachusetts' prevailing wage law was first enacted in 1914 and has been amended since.[158] The law states that workers must not be paid less than laborers working for the town where public works are constructed by the state, any county, town, or district, or persons contracting or subcontracting for such work. Fringe benefits are included.[159] Additions, alterations, painting, and demolition are covered.[160]

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[148] 40 U.S.C.A. § 276a(a) (1969).

[149] *Id.* at § 276a(b).

[150] Hawaii Rev. Stat. § 104-2(a) (1976).

[151] *Id.* at § 104-2(b).

[152] *Id.* at § 104-1(5).

[153] *Id.* at § 104-1(4).

[154] *Id.* at § 104-1(2).

[155] La. Rev. Stat. Ann. § 38:2301(B) (West 1968).

[156] *Id.* at § 38:2301(K).

[157] *Id.* at § 38:2301(J).

[158] Thieblot Prevailing Wage Laws of the States and the District of Columbia (The Merit Shop Foundation, Ltd. 1980) at 13.

[159] Mass. Ann. Laws ch. 149 § 26 (Law Co-op 1976).

[160] *Id.* at § 27D.

Missouri's 1957 prevailing wage law requires that all workers employed by or on behalf of any "public body" constructing "public works" must be paid at least the prevailing hourly rate of wages for similar work in the locality.[161] A "public body" may be the state, any board, commission, or other political subdivision.[162] "Public works" are defined as all fixed works constructed for public use.[163] "Construction" includes reconstruction, improvement, enlargement, alteration, painting, decorating, and major repair, but excludes maintenance.[164] Fringe benefits are included.[165]

New Mexico's reenacted 1965 prevailing wage law survived a repeal attempt in April 1981. Democratic Governor Bruce King vetoed the repeal bill that had passed the state legislature.[166]

Under the law, every contract in excess of $20,000 to which the state or any political subdivision is a party, for construction, alteration, demolition, repair, painting, or decorating of public buildings or works, and which involves the employment of workers, must contain a provision that the contractor will pay all workers employed on the site at least the minimum prevailing wage for similar work in the area.[167] Fringe benefits are included.[168]

New Mexico's former law was challenged unsuccessfully on constitutional grounds. In *City of Albuquerque v. Burrell*, the New Mexico Supreme Court stated:

> The law does not give the [State Labor Commissioner] the power to set a minimum scale of what he thinks they should be, but only to determine the prevailing wage being paid in a municipality or political subdivision, and set them out in his order as the minimum wage to be paid. . . . In other words, on the finding of certain facts by him the legislative act is effective. . . . [T]hese statutes [referring to California's similar law] providing the wages that must be paid on public works are constitutional.[169]

Rhode Island's reenacted 1935 prevailing wage law states that every contract in excess of $1000 for construction, alteration, repair, painting, or decorating of public buldings or works, to which the state or any political subdivision is a party, must contain a provision specifying the minimum wages to be paid based on prevailing wages for workers employed on similar projects in the area.[170] Fringe benefits are included.[171] "Public works" include improvement of any public building or "any public works projects of any nature or kind whatsoever."[172]

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[161] Mo. Ann. Stat. § 290.230(1) (Vernon 1965).

[162] *Id.* at § 290.210(6).

[163] *Id.* at § 290.210(7).

[164] *Id.* at § 290.210(1).

[165] *Id.* at § 290.210(5).

[166] Engineering News-Record, April 9, 1981 at 78.

[167] N.M. Stat. Ann. § 13-4-11 (1978 & Supp. 1982).

[168] *Id.* at § 13-4-12.

[169] 326 P.2d 1088, 1091, 1092 (N.M. 1958).

West Virginia's 1935 prevailing wage law requires that all workers employed by or on behalf of any "public authority" engaged in the "construction" of "public improvements" be paid no less than the prevailing hourly rate of wages for work of a similar character in the locality.[173] A "public authority" includes any board, commission, or agency of a state or its political subdivision authorized to enter into a contract for the construction of a public improvement.[174] "Construction" includes reconstruction, improvement, enlargement, painting, decorating, and repair (not temporary or emergency).[175] "Public improvements" encompass all buildings and structures for which a state or its political subdivision may let a construction contract.[176] The Department of Labor must consider wage rates established by collective bargaining agreements.[177]

Five states' prevailing wage laws are implied to exclude school districts generally as not involving "state" construction: Colorado, Maine, Minnesota, Tennessee and Wyoming.

Colorado's 1933 prevailing wage law survived a repeal attempt in June 1981. Democratic Governor Richard Lamm vetoed the repeal bill that had passed both state houses, claiming that the law assured high-quality work on state-funded jobs.[178]

Under the law, all contracts in excess of $5000 involving the employment of labor for construction of any building or public work in the state, to which the state is a party, must contain a prevailing wage provision. The contractors and subcontractors cannot pay less than the prevailing wage rate for work of a similar nature in the town (or other civil subdivision) where the project is located.[179]

Maine's 1954 prevailing wage law calls for laborers employed in the construction of "public works" to be paid an hourly wage not less than the "fair minimum" wage.[180] The "fair minimum" wage is defined as the prevailing wage determined by the Director of the Bureau of Labor and Industry.[181] "Public works" include "all buildings . . . upon which construction may be let to contract by the State and which contract is $10,000 or more."[182] Construction, reconstruction, demolition, improvement, enlargement, painting, decorating, and repair are covered.[183]

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[170] R.I. GEN. LAWS § 37-13-7(a) (1977).
[171] *Id.* at § 37-13-6.
[172] *Id.* at § 37-13-1.
[173] W. VA. CODE § 21-5A-2, 3 (1981).
[174] *Id.* at § 21-5A-1(1).
[175] *Id.* at § 21-5A-1(2).
[176] *Id.* at § 21-5A-1(4).
[177] *Id.* at § 21-5A-1(5).
[178] Engineering News-Record, May 28, 1981 at 68-69, June 4, 1981 at 5.
[179] COLO. REV. STAT. § 8-16-101(1) (1973).

Minnesota's 1973 prevailing wage law requires that every contract for a "project" to which the state is a party contain a stipulation that no laborer be paid a lesser rate of wages than the prevailing wage rate of similar occupations in the area.[184] A "project" is the construction, erection, remodel, or repair of any public work financed at least in part by state funds.[185] If more than one occupation is needed, the contract must be in excess of $25,000 to apply the law.[186] Fringe benefits are included.[187]

Tennessee's 1975 prevailing wage law requires any contractor entering into a state contract for the performance of work on a "state construction project" to pay at least the prevailing wage rate for all classifications of labor.[188] A "state construction project" is defined as involving a contract which exceeds $50,000 for any building or work funded by the state. Erection, remodeling, alteration, repair, demolition, and additions are covered.[189]

Under Wyoming's 1967 prevailing wage law, all workers employed by or on behalf of any "public body" engaged in the construction (not maintenance) of "public works" must be paid no less than the prevailing hourly rate of wages for work of a similar character in the locality.[190] "Public body" means the state or one of its officers, boards, or commissions.[191] "Construction" includes reconstruction, improvement, enlargement, alteration, and repair in excess of $25,000.[192] "Public works" include all fixed works constructed for public use, whether or not they are under public supervision or paid for partly out of public funds.[193]

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[180] Me. Rev. Stat. Ann. tit. 26 § 1303 (1974).
[181] *Id.* at § 1304(5).
[182] *Id.* at § 1304(8).
[183] *Id.* at § 1304(2).
[184] Minn. Stat. Ann. § 177.43(1) (West Supp. 1982).
[185] *Id.* at § 177.42(2).
[186] *Id.* at § 177.43(7).
[187] *Id.* at § 177.42(6).
[188] Tenn. Code Ann. §§ 12-4-403, 12-4-408 (1980).
[189] *Id.* at § 12-4-402(c).
[190] Wyo. Stat. § 27-4-403(a) (1977).
[191] *Id.* at § 27-4-402(a)(vi).
[192] *Id.* at § 27-4-402(a)(i).
[193] *Id.* at § 27-4-402(a)(vii).

SUMMARY

This analysis of the prevailing wage statutes and case law reveals an inconsistent, varied picture. School boards argue that the original purpose of preventing local labor exploitation during the Depression bears reexamination by state legislatures. Public policymakers need to weigh the effects of establishing wages for activities which otherwise are regulated by market supply and demand. Economists debate the impact of such legislation on the economy whereas educators are more concerned with the cost of educational facilities. School boards are charged with providing necessary facilities within the taxpayers' ability to assume those burdens.

The many different statutes raise some interesting questions. The manner in which a state legislature delegates authority to a state agency is of great importance. Broadly-worded, vague guidelines subject themselves to the continuing threat of a legal challenge. The litigation would focus on an unconstitutional delegation of legislative authority. Conversely, where state legislatures have enacted specific, nondiscriminatory prevailing wage rules, this contention becomes extremely difficult to successfully argue.

Many procedural problems remain, ranging from the definitions of "construction," "locality," and "state project" to the standing of parties who may challenge prevailing wage determinations. A related issue involves the lowest responsible bidder requirement prevalent in the states. Assuming that all bidders on an educational facility construction project incorporate the same unit labor costs, i.e., the prevailing wage rates, then a significant element of total project cost is virtually equalized.

An examination of the state prevailing wage cases uncovers a great reluctance by the courts to endorse the wisdom of state law. Yet merely litigating such legislation based on a public policy argument has not found a receptive hearing. Policy formulation and enactment clearly lie within the purview of the various state legislatures.